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IN THE

Supreme Court of the United States

IN RE AGENT ORANGE PRODUCT LIABILITY LITIGATION:

DOW CHEMICAL COMPANY, MONSANTO COMPANY, ET AL.,
Petitioners,

v.

DANIEL RAYMOND STEPHENSON, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether absent class members are precluded from relitigating the issue of adequacy of representation through a collateral attack on a class settlement, after class members had a full opportunity to opt out, object, and appeal, and after both the trial court and the court of appeals, in the course of approving the settlement, expressly determined that the class representatives adequately represented the entire class.

2. Whether, if collateral attack is permissible, the "adequacy of representation" issue is properly determined as of the time of the original litigation or in light of events and changes in the law occurring years after the settlement has become final and all of the settlement proceeds have been disbursed.

PARTIES TO THE PROCEEDING

Petitioners:

Dow Chemical Company

Monsanto Company

Hercules Incorporated

Occidental Chemical Corporation

Ultramar Diamond Shamrock Corporation

Chemical Land Holdings, Inc.

Maxus Energy Corporation

Harcros Chemical, Inc.

Thompson-Hayward Chemical Company

T H Agriculture & Nutrition Company, Inc.

C.D.U. Holdings, Inc.

Uniroyal, Inc.

Uniroyal Chemical Company

Respondents:

Daniel Raymond Stephenson

Susan Stephenson

Daniel Anthony Stephenson

Emily Elizabeth Stephenson

Joe Isaacson

Phyllis Lisa Isaacson

CORPORATE DISCLOSURE STATEMENT

Dow Chemical Company, Monsanto Company, and *Hercules Incorporated* have no parent corporations and no publicly held company owns 10 percent or more of their stock.

Occidental Chemical Corporation, the successor by merger to Diamond Shamrock Chemicals Company (which was known prior to September 1, 1983, as Diamond Shamrock Corporation), is an indirect, wholly-owned subsidiary of Occidental Petroleum Corporation, a publicly held company.

Ultramar Diamond Shamrock Corporation was acquired in 2001 by Valero Energy Corporation, which has no parent corporation and no publicly-held shareholder with 10 percent or more of its stock.

Maxus Energy Corporation and *Chemical Land Holdings, Inc.*, are indirect, wholly-owned subsidiaries of YPF S.A. ("YPF"). Approximately 98 percent of YPF's stock is owned by Repsol YPF S.A.

Uniroyal, Inc., and *C.D.U. Holdings, Inc.*, are dissolved corporations.

Uniroyal Chemical Co. is wholly-owned by Crompton Corporation, a publicly held company.

T H Agriculture & Nutrition Company, Inc. (now known as T H Agriculture & Nutrition L.L.C.) is a wholly-owned subsidiary of Philips Electronics North America Corporation, which is, in turn, an indirect wholly-owned subsidiary of Koninklijke Philips Electronic N.V.

Thompson-Hayward Chemical Co. no longer exists. The assets of Thompson-Hayward Chemical Co. were purchased by *Harcros Chemical, Inc.*, which has no corporate parent and no publicly-traded shareholder with 10 percent or greater control of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-20a) is reported at 273 F.3d 249 (2d Cir. 2001). The orders of the district court dismissing respondents' complaints (App., *infra*, 23a-26a) are not reported. The transcript of the oral argument in the district court on petitioners' motion to dismiss has been reproduced as Appendix E to this petition (App., *infra*, 27a-44a).

JURISDICTION

The judgment of the court of appeals was entered on November 30, 2001. Petitioners filed a timely petition for rehearing with a request for rehearing en banc, which the court of appeals denied on May 8, 2002. On July 29, 2002, Justice Ginsburg extended the time for filing a petition for a writ of certiorari until August 20, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

Rule 23(e) of the Federal Rules of Civil Procedure provides: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

INTRODUCTION

This case presents important questions of law that have divided the courts of appeals: (i) whether the doctrine of *res judicata* precludes the successive relitigation, through collateral attack on an otherwise final judgment based on a court-approved settlement, of the question whether the interests of nonnamed class members were adequately represented, and (ii) if not, whether adequacy of representation is properly assessed as of the time the class was certified (subject to review by the certifying court and on appeal following settlement or trial), or later—retrospectively—based on a *post-hoc* assessment of the results ultimately obtained by class members and any intervening changes in the law.

STATEMENT OF THE CASE

1. Beginning in 1978, hundreds of individual lawsuits and class actions were brought on behalf of 2.5 million veterans who served in Vietnam between 1961 and 1972 and their family members against petitioners, the manufacturers of Agent Orange, an herbicide that petitioners supplied to the United States Government in compliance with military specifications for use as a defoliant. The complaints asserted that exposure to Agent Orange had caused or would cause thousands of veterans to suffer a variety of illnesses. The cases were consolidated before then-Chief Judge Weinstein of the United States District Court for the Eastern District of New York, who certified a class of veterans and their families.

As Judge Weinstein and the Court of Appeals for the Second Circuit would later remark, the class members faced numerous obstacles to recovery, several of which appeared (and still appear) almost surely insurmountable. Among those obstacles were (1) the complete absence of competent and admissible evidence that Agent Orange is likely to cause *any* disease—let alone that it actually caused those attributed to it by the class members—and (2) petitioners' entitlement to complete immunity from liability under the military contractor doctrine (which the Second Circuit in fact later held barred the claims of those who opted out of the eventual class settlement). *See In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

Despite the weakness of the class members' claims, in order to bring a consensual end to what had already been years of litigation and achieve final and complete peace with the veteran class, petitioners agreed in May 1984 to pay $180 million to settle the action. As an explicit condition of the offer, petitioners insisted that all class members who had been exposed to Agent Orange—specifically including those whose injuries had not yet manifested—be covered by the settlement and "forever barred" from bringing Agent Orange claims against them. Following eleven days of fairness hear-

ings around the country, Judge Weinstein concluded that the lump-sum settlement offered by petitioners was the best (and, indeed, only) way to achieve any benefits for the class members; accordingly he approved the settlement as fair, reasonable, and adequate under Rule 23 of the Federal Rules of Civil Procedure. *Id.* at 155-56. As the court of appeals later observed, the settlement was a highly favorable one for the class members, in view of their "dim prospects" for any recovery following a trial.[1] *In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425, 1437 (2d Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994).

As for the allocation of settlement funds, Judge Weinstein concluded that in view of the lack of evidence that Agent Orange had caused any class member to sustain any illness, there was no logical way to distribute funds based on the strength or weakness of class members' individual claims or based on categories (or subclasses) of claims or claimants. Judge Weinstein instead adopted a "compensation-based" plan under which a portion of the settlement fund would be allocated to cash payments to particularly needy class members and their families, and the balance would be used to fund social service programs designed to provide general benefits to the entire class. *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d at 151, 158. Seventy-five percent of the settlement fund was to be allocated to survivors of deceased

[1] In fact, Judge Weinstein later entered summary judgment against the several hundred plaintiffs who opted out of the class action in favor of individual actions, concluding (i) that none of the opt-out plaintiffs could prove that his or her ailment or ailments were caused by Agent Orange, (ii) that none of the opt-out plaintiffs could prove which defendant manufactured the Agent Orange that allegedly injured him or her, and (iii) that all of the opt-out plaintiffs' claims were barred by the military-contractor defense. The court of appeals affirmed, concluding that all defendants were entitled to summary judgment on the basis of the military contractor defense. *See In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 187, 189 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988).

veterans and to veterans who became totally disabled due to illness before 1995—*i.e.*, ten years beyond the date of settlement and 20-25 years after any possible exposure. The remaining 25 percent was to be used to establish a class assistance foundation for the benefit of all of the veterans in the class—including respondents—in order to help them "mobilize themselves and others to deal with their medical and related problems." *Id.* at 158.

Apart from two minor aspects relating to the distribution of the settlement fund, the court of appeals upheld the settlement in its entirety.[2] It unequivocally rejected a challenge to the adequacy of class member representation, specifically rejecting the argument advanced by various objectors—and later repeated by respondents—that "the diverse interests of the class make adequate representation virtually impossible." *Id.* at 167. Indeed, the court of appeals agreed with Judge Weinstein that there was no significant difference among class members in light of the fact that all class members' claims had serious common weaknesses. Observing that none of the class members had a realistic chance of success on the merits, the court of appeals concluded that the settlement was fair, reasonable, and adequate. In reliance on these rulings, petitioners paid $180 million to settle all of the class members' claims, including $45 million for the general benefit of all class members, including those such as respondents who might become ill after 1994.

. 2. Two years after the judgment approving the *Agent Orange* settlement became final, two new actions (the

[2] The court of appeals concluded that the Class Assistance Fund should be administered directly by the district court, rather than by an independent board of trustees, and that it should be managed so the funds would eventually be "consumed" in their entirety. The Class Assistance Fund ultimately distributed $71.3 million for the benefit of all class members. *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 179, 184-86 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988).

Ivy/Hartman actions) were filed against petitioners on behalf of a purported class of Vietnam veterans who claimed to have discovered injuries—which they asserted had been caused by exposure to Agent Orange—after the settlement was reached. Judge Weinstein dismissed their claims, concluding that they were precluded by the 1984 settlement. The plaintiffs appealed, contending (as the present respondents later would) that future claimants had been inadequately represented in connection with the original class action. In rejecting this argument, the court of appeals noted that it was not "writing on a clean slate" and that in any event, even nine years later, "the fundamental fairness of the *Agent Orange I* settlement remains unshaken." *In re Agent Orange Prod. Liab. Litig.*, 996 F.2d at 1437.

The court of appeals specifically rejected the argument that separate counsel should have been appointed to represent the interests of class members whose symptoms would manifest themselves only after the 1984 settlement, concluding that "the even-handed treatment of both identified and unidentified legitimate claimants in the *Agent Orange I* settlement and the dim prospects of success both then and now" rendered separate counsel unnecessary. *Id.* In fact, the court of appeals noted (for the second time) that the representation of all the class members in *Agent Orange I* was "more than adequate to protect [the *Ivy/Hartman* plaintiffs'] interests," and that class members who became ill after the settlement was reached—having been parties to a class action lawsuit in which there was a final settlement and judgment—were thus barred from pursuing claims against petitioners. *Id.*

3.a. In 1998, five years after the court of appeals affirmed the entry of summary judgment in the *Ivy/Hartman* actions, respondents filed separate individual actions against petitioners. In their complaints, respondents alleged that they had recently become ill and that their illnesses had been caused by exposure to Agent Orange during the Vietnam War. Respondents had not attempted to intervene in the class

action litigation, to opt out of the class, or to object to the fairness of the settlement; they also had not participated in the *Ivy/Hartman* litigation. Like the *Ivy/Hartman* plaintiffs, respondents had not fallen ill by 1984 when the settlement became final. Respondents asserted that their illnesses did not manifest themselves until after the portion of the settlement devoted to providing direct cash payments to veterans was exhausted. They contended that their inability to receive direct cash payments necessarily meant that they could not have been adequately represented in connection with the settlement.

b. Judge Weinstein rejected this contention, finding that respondents, like "[e]very veteran[,] . . . benefited" from the $71.3 million distributed by the Class Assistance Fund, even if they were not among the relatively small proportion of class members who received direct cash death or disability payments. App. 42a. As Judge Weinstein explained, the Class Assistance Fund financed a variety of programs that, among other things, contributed substantially to the passage of federal Agent Orange legislation, which continues to provide benefits to many class members—including respondent Isaacson. App. 42a.

c. The court of appeals reversed (App. 1a-20a), this time concluding that the doctrine of *res judicata* did not bar further litigation of the issue of adequate representation. Instead, the court held that it was obligated to decide *de novo* whether respondents had been adequately represented, notwithstanding its own prior holdings that all nonnamed class members, including those whose symptoms had not yet manifested at the time of the settlement, had in fact been adequately represented and that the class action settlement was fair, reasonable, and adequate. The court stated that the prior decisions had not expressly considered the specific situation of veterans becoming ill after 1994. App. 18a-19a.

Invoking the standards for class certification under Rule 23 set forth in this Court's intervening decisions in *Amchem*

Products, Inc. v. *Windsor*, 521 U.S. 591 (1997), and *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815 (1999), the court of appeals concluded that class members who became ill after 1994 had *not* been adequately represented, and that the failure to certify a subclass of individuals who would become ill after 1994 denied those class members due process of law. It concluded this even though Judge Weinstein and all of the attorneys and class members certainly knew in 1984—and the class action settlement expressly provided for the fact—that there would be some class members who would manifest symptoms only after 1994, and that the identities of those class members were not discernible in 1984. The only explanation given by the court of appeals was the assertion (which ignored the benefits obtained through the Class Assistance Fund) that the settlement "only provided for recovery for those whose death or disability was discovered prior to 1994" and "[n]o provision was made for post-1994 claimants." App. 19a. The court of appeals did not attempt to justify or explain the application of new legal standards to a long-final judgment.

d. Petitioners filed a timely petition for rehearing with a request for rehearing en banc. The court of appeals denied the petition and rejected the request on May 8, 2002. App. 21a-22a.

REASONS FOR GRANTING THE PETITION

The Second Circuit held that nonnamed class members cannot be precluded from collaterally attacking the judgment's binding effect on them on the grounds of inadequate representation, even when (i) adequacy of representation for all class members has been determined by the district court following hearings, (ii) that determination was affirmed on appeal, (iii) the time for seeking direct review of that determination has long since passed, (iv) another collateral attack by nonnamed class members—who like respondents had no symptoms at the time of the settlement and who claimed inadequacy of representation—has been litigated with the representation again deemed adequate, and (v) the settling defendants have irrevocably paid out the settlement proceeds in reliance on the finality of the settlement. The court of appeals did not assess the adequacy of representation as of the time the class was certified, or even when the settlement was approved and then reviewed on appeal. Instead, the court made a *de novo* evaluation as of the time of the collateral attack, making a *post-hoc* assessment of the results the dissatisfied class members turn out to have obtained and applying legal standards that did not exist at the times the settlement was negotiated, approved, and affirmed.

This approach conflicts with the ruling of the Ninth Circuit in *Epstein* v. *MCA, Inc.*, 179 F.3d 641 (9th Cir.), *cert. denied*, 528 U.S. 1004 (1999), and is in serious tension with the rulings of the First and Third Circuits in *Nottingham Partners* v. *Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991), and *Grimes* v. *Vitalink Communications Corp.*, 17 F.3d 1553 (3d Cir. 1994). In the *Epstein* case, the Ninth Circuit, on remand from this Court's decision in *Matsushita Electrical Industrial Co.* v. *Epstein*, 516 U.S. 367 (1996), held that the question of adequacy of representation in a settled class action may not be reopened in subsequent actions in which class members seek to escape the effects of the judgment. Under the Ninth Circuit's ruling, the appropriate methods for class members to express dissatisfaction with the certification of a class or the settlement of a class action that will affect their rights are to object to certification, to opt out of the class, or to object to the settlement in the trial court, followed by an appeal if necessary. The First and Third Circuits, like the Ninth Circuit, have also held that nonnamed class members may not bring collateral attacks on court-approved class action settlements, as long as the settlement court employed procedures that comported with due process.

The consequence of the Second Circuit's contrary holding is to open a new chapter (or chapters) in the otherwise-settled *Agent Orange* litigation—litigation that has produced

numerous published opinions by the district court and court of appeals, including opinions upholding the settlement against legal challenge. *See Hercules, Inc.* v. *United States*, 516 U.S. 417, 420 (1996) (summarizing *Agent Orange* litigation history). This conclusion not only undermines the legal peace that petitioners paid $180 million to secure, but also jeopardizes any other class settlement reached in the past in which the settlement class contained persons who could propound a minimally plausible contention that their circumstances differed from those of the class representatives and that they therefore were not "adequately" represented, despite explicit contemporaneous judicial findings to the contrary.

The court of appeals reached its (literally) unsettling conclusion by reasoning that this Court's decisions in *Amchem* and *Ortiz* (which construed Rule 23 on direct appeal from decisions approving settlements and thus differed fundamentally from this collateral attack) somehow nullified settled principles of *res judicata* and finality. The court read those decisions as implying that any member of a settlement class who claims a distinction from other class members of a sort not specifically discussed and explicitly rejected in approving the settlement has an absolute right to litigate the question of whether his or her interests were "adequately represented" years earlier, even if the courts at the time specifically found the representation of all class members to have been adequate.[3] Moreover the court below held that, in

[3] Asserting that allowing respondents' collateral challenge to proceed would be consistent with other decisions "recognizing the ability of later plaintiffs to attack the adequacy of representation in an earlier class action," App. 15a, the Second Circuit relied principally on the Fifth Circuit's opinion in *Gonzales* v. *Cassidy*, 474 F.2d 67 (1973). *Gonzales*, however, did not involve a class action settlement at all, but rather a judgment following trial on the merits; moreover, in *Gonzales*, the first and only event even suggesting that the rights of nonnamed class members were not adequately represented occurred after that judgment was entered—when the trial court clarified its judgment to hold that only the class representative, and none of the nonnamed class members, was entitled to retrospective relief.

evaluating the question of adequacy of representation during collateral litigation, the disappointed class members not only have the right to challenge the binding effect of the settlement based on facts that develop subsequently, but also are entitled to the benefit of any intervening changes in the law.

The consequences of the decision below, if permitted to stand, will be long-enduring and pernicious. Simply put, that decision so substantially undermines the finality accorded to fully-reviewed class action settlements and judgments that it renders virtually impossible the achievement of any consensual global settlement—or even a truly final judgment after trial and appeal—in many complex class actions. If class action litigation cannot result in a settlement or judgment that reliably binds nonnamed class members, the goals of the class action procedure will have been gravely subverted. This Court should grant the petition to resolve the circuit split on the important and recurring questions of law presented by this case.

I. THE COURT SHOULD DECIDE WHETHER, ONCE THE ISSUE OF ADEQUACY OF REPRESENTATION HAS BEEN DETERMINED, IT IS *RES JUDICATA* AND MAY NOT BE COLLATERALLY RELITIGATED BY CLASS MEMBERS WHO HAD THE OPPORTUNITY TO OPT OUT, OBJECT, AND APPEAL THE SETTLEMENT.

The doctrine of *res judicata* provides that a matter already litigated and resolved is binding on the parties and cannot be relitigated. Under this principle, a judgment in a class action, including a judgment entered upon a settlement, normally binds absent class members. *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812 (1985). The question presented in this case is whether that principle applies to a class

member's claim that he or she had been inadequately represented in the original proceedings. The court of appeals held that it does not, and consequently permitted a collateral attack on the otherwise-final settlement in the *Agent Orange* litigation—a settlement that was reached almost 20 years ago following extensive litigation, negotiation, and judicial scrutiny. Indeed, the court ruled that *res judicata* did not apply even though the issue of "inadequacy of representation" of veterans with no manifested illness had been raised on direct appeal and then again later by other nonnamed class members seeking to attack the settlement collaterally, and had been rejected on the merits both times.

Moreover, the court ruled that such a collateral attack will succeed in unwinding an otherwise final settlement (or judgment) whenever the unnamed class member can satisfy the district court or court of appeals that, with the benefit of hindsight, resolution of the class action turned out to be less advantageous for him or her than it was for other class members. In this inquiry, the court appears to have held, no consideration whatever was due the unfairness to settling defendants of allowing new litigation at such a belated juncture. App. 16a.

The principal question thus posed is whether a judicial determination, upheld on appeal, that all nonnamed class members' interests were adequately represented is *res judicata*, and therefore no longer subject to collateral attack, as against a class member who had the opportunity to but did not opt out, object, or appeal. The Second Circuit's rejection of this proposition squarely conflicts with the rule in the Ninth Circuit. In *Epstein* v. *MCA, Inc.*, 179 F.3d 641 (9th Cir.), *cert. denied*, 528 U.S. 1004 (1999), the Ninth Circuit, on remand from this Court's decision in *Matsushita Electric Industrial Co., Ltd.* v. *Epstein*, 516 U.S. 367 (1996), held that as long as the procedures followed by the certifying court complied with due process, "the absent class members' due process right to adequate representation is protected not by

collateral review, but by the certifying court initially, and thereafter by appeal." *Epstein*, 179 F.3d at 648-50 (per O'Scannlain, J.).

The Ninth Circuit further concluded, in conflict with the court below, that the "process due" absent class members consists of fair procedures employed by the trial court during the pendency of the class action litigation to determine the adequacy of representation. That conclusion was held to follow directly from this Court's holding in *Matsushita* that members of a plaintiff class in a Delaware state-court shareholder suit who were also named plaintiffs in a rival class action in federal court but who did not opt out of the Delaware state-court class, were necessarily "bound, then, by the judgment" resulting from the settlement of the Delaware action. *Matsushita*, 516 U.S. at 379.

The Ninth Circuit's ruling is in accord with decisions of the First and Third Circuits, which likewise have held that the appropriate avenue for obtaining review of allegedly erroneous class determinations is a direct appeal, not a collateral attack at some later time. *See Nottingham Partners* v. *Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991); *Grimes* v. *Vitalink Communications Corp.*, 17 F.3d 1553 (3d Cir. 1994). Those courts have agreed that a final judgment, entered pursuant to a court-approved settlement agreement, cannot be subject to collateral attack by dissatisfied class members who were afforded a constitutionally sufficient opportunity to voice their objections before the court that certified the class and approved the settlement.

In *Nottingham Partners*, the First Circuit held that a release that surrendered class members' federal securities-law claims, given in settlement of a Delaware state-court class action, barred dissatisfied class members from pursuing those claims in federal court. In contrast to *Epstein* and to the *Agent Orange* litigation, the dissatisfied class members in *Nottingham Partners* had not even been provided the opportunity to opt out of the class. Despite this feature, which the

dissatisfied class members sought to challenge on collateral attack, the First Circuit held that "a court-approved settlement containing a release may be applied against a class member who is not a representative member, even if that member objects to the settlement, so long as acceptable procedural safeguards have been employed." 925 F.2d at 33. Because the "Delaware courts, affording all the prophylaxis which the Due Process Clause commands," *id.*, adjudicated the question of whether class members should have been allowed to opt out, the First Circuit held that the class members' only recourse consisted of direct appeals in state court, followed by a petition to this Court for a writ of certiorari, not of an independent action in the lower federal courts "in the vain pursuit of back-door relief." *Id.*

Grimes presented a similar factual situation and produced a similar ruling from the Third Circuit, which held that dissatisfied class members in a Delaware state court class action were barred by the settlement of that action from pursuing their claims in independent litigation. The opportunity provided the dissatisfied class members to be heard in the Delaware state-court proceedings and to raise the issue on direct appeal meant that they "had been granted all the process that was due." 17 F.3d at 1558.

The court below purported to harmonize its decision with that of the Ninth Circuit in *Epstein*, but its discussion shows the irreconcilable conflict. After accurately describing the Ninth Circuit's holding that due process "'requires that an absent class member's right to adequate representation be protected by the adoption of the appropriate procedures by the certifying court'" and subsequent courts on direct review, not by "'collateral second guessing of those determinations,'" App. 17a n.6 (quoting *Epstein*, 179 F.3d at 648), the Second Circuit declined to "adopt[] the Ninth Circuit's decision in *Epstein*," because "neither the district court nor this Court has [previously] determined the adequacy of representation *with respect to these plaintiffs* whose injuries did not arise

until after the settlement expired," App. 17a n.6 (emphasis in original). This explanation reflects the Second Circuit's belief that *res judicata* does not set in unless the courts have previously determined the issue of adequacy of representation in connection with the specific argument and circumstances presented by a given class member on collateral attack. That belief is contrary to the proper focus by the Ninth Circuit on the adequacy of the *process* provided in the prior proceeding for absent class members to voice any objection to their representation.

The discordant approach of the Second Circuit creates a rule under which any class member who can subsequently assert that his or her personal circumstances differ in some way from those of the class representatives (and from other class members who have previously raised and lost similar objections on collateral attack) is free to reopen the issue of adequacy of representation in a fresh proceeding. That regime is untenable, inconsistent with fundamental notions of finality, and certainly not required by due process.[4]

The willingness of the court of appeals to disregard its prior response to the *Ivy/Hartman* collateral attack demonstrates the extraordinary breadth of its rule allowing indi-

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[4] *See also, e.g.*, Linda Silberman, *The Vicissitudes of the American Class Action—With a Comparative Eye*, 7 Tul. J. Int'l & Comp. L. 201, 214 (1999) (allowing class members who do not opt out thereafter to collaterally attack the determination of adequacy of representation "represents serious danger to the finality that is the essence of class litigation and settlements"); William T. Allen, *Finality of Judgments in Class Actions: A Comment on* Epstein *v.* MCA, Inc., 73 N.Y.U. L. Rev. 1149, 1159-60 (1998) ("If every member of the class who does not actually appear in a class suit prior to judgment is able to trigger a review of the quality of the efforts of those representing the class, we will have, insofar as class actions are concerned, reinvented the problem of inefficiency and second guessing that is solved by the rule of finality and recognition of judgments.").

vidualized arguments about inadequacy of representation. The court distinguished the current respondents from the *Ivy/Hartman* class members, whose claim of inadequate representation the Second Circuit had previously rejected, because the *Ivy/Hartman* class members had become ill in the first ten years after the settlement whereas the present respondents did not develop illnesses until after that period. As of 1984, however, when the class representatives negotiated the settlement, there was no difference among the absent class members who were not yet ill. That is to say, no one then could have known whether they would become ill by 1994, only after 1994, or never. Thus, if the *Ivy/Hartman* plaintiffs were adequately represented, respondents must have been as well—unless one looks at the outcomes retrospectively as of the time of respondents' collateral attack, fourteen years after the *Agent Orange* settlement.

Rather than creating an incentive for class members who receive notice of an action or a proposed class settlement and feel dissatisfied with their representation to object to certification, representation, or the proposed settlement, the rule that now applies in the Second Circuit encourages nonnamed class members to withhold any objection. The only way they could be bound by the resulting settlement or judgment would be if they informed the district court of their concerns regarding the adequacy of the representation. It should go without saying that this rule will drastically reduce the incentive for defendants to settle. *See, e.g.*, Marcel Kahan & Linda Silberman, Matsushita *and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims*, 1996 S. Ct. Rev. 219, 270-71 (noting that the prospect of collateral attacks on class-action settlements will encourage class members to "decide where they have the best opportunity to make the challenge, and engage in their own kind of forum shopping," and that this will result in a "significantly reduced incentive for defendants to enter into a global class action settlement").[5]

The Second Circuit's analysis also disregards the fact that the district court has a special duty to look out for the interests of nonnamed class members, precisely because they are not present but will be bound by the disposition of the case. *See, e.g.*, *Reynolds* v. *Beneficial Nat'l Bank*, 288 F.3d 277, 279-80 (7th Cir. 2002) (Posner, J.) ("We and other courts have gone so far as to term the district judge in the settlement phase of a class action a fiduciary of the class . . . ."); *Grant* v. *Bethlehem Steel Corp.*, 823 F.2d 20, 22 (2d Cir. 1987). That is part of the reason why the Ninth Circuit found it proper to focus upon the procedural regularity of the initial

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[5] Due process does require, of course, that notice be constitutionally adequate for a judgment to bind an absent class member. The question of adequacy of notice, however, was properly resolved by Judge Weinstein, who crafted extraordinary measures to ensure adequate notice—measures that the court of appeals itself "concluded [were] the 'best notice practicable' under Federal Rule of Civil Procedure 23(c)(2)." App. 6a. Although the court below suggested in a footnote (App. 19a n.8), that "plaintiffs likely received inadequate notice" because "*Amchem* indicates that effective notice could likely not ever be given to exposure-only class members," it explicitly stated that this was not part of the basis for its decision. App. 19a.

In any event, although *Amchem* left open the question whether the class of individuals from all walks of life who may have been exposed to asbestos over a 50-year period was too amorphous ever to receive adequate notice, that concern does not apply to the far more identifiable class of military veterans who served in Vietnam during specified times, which cannot reasonably be described as "unselfconscious and amorphous," *Amchem*, 521 U.S. at 628. Moreover, as discussed *infra* at pp. 19-27, the suggestion that changed views on adequacy of notice inferable from the subsequent decision in *Amchem* provide a basis to reopen a matter in which a final judgment was long since entered completely disregards this Court's admonition that the validity of a final judgment is not called into question even if "the judgment may have been wrong or rested on a legal principle subsequently overruled in another case," *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981).

proceedings rather than trying to isolate specific claims that individual class members had not previously litigated. In this case, of course, there can be no question that both the district court and the court of appeals gave careful consideration to the fairness of the plan toward class members whose symptoms would manifest only after the time of the settlement.

The split created by the Second Circuit's opinion concerns an issue of great moment. Multidistrict litigation like the *Agent Orange* litigation, in which actions can be transferred "to any district," 28 U.S.C. § 1407(a), highlights the need for uniformity and review by this Court. The outcome in mass tort litigation should not be determined by the outcome of the administrative decision to assign that litigation to a district in one judicial circuit rather than another for pretrial management.

In addition, as mentioned above, at the time the class was notified of the impending settlement in 1984, respondents were in precisely the same position as were the plaintiffs in the *Ivy/Hartman* litigation. At that time, neither the *Ivy/Hartman* plaintiffs nor respondents here had manifested illnesses. At that time, all such absent class members were called upon to object to the settlement, to opt out of the class, or to stand bound by the settlement judgment. The Second Circuit previously held that the *Ivy/Hartman* plaintiffs were precluded from collaterally attacking the settlement, concluding that the process followed at the time of the settlement was fair and that adequacy of representation as to all class members had been litigated and resolved at that time. That ruling, specifically addressing the issue with respect to class members who were asymptomatic in 1984, should certainly have precluded still further relitigation in later suits.

Accordingly, even if there were some merit to the Second Circuit's approach of allowing absent class members an opportunity to lodge a collateral attack on a settlement to challenge the adequacy of representation, principles of *res judicata* and practical efficiency in judicial administration

must bar endless relitigation of that issue by each person who becomes disgruntled with the settlement years after it has been completed and approved and can identify some difference in circumstances from those of previous objectors and collateral litigants—particularly one obviously foreseen by the settlement court and the court of appeals on direct review of the settlement.

This Court should decide, therefore, whether once a case is settled and there has been a final ruling that the class has been adequately represented, *res judicata* bars any collateral challenge to that judgment or whether, as the court below here held, absent class members are entitled to litigate their own circumstances in separate proceedings.

II. THE COURT SHOULD ALSO RESOLVE WHETHER ADEQUACY OF REPRESENTATION IS TO BE DETERMINED AS OF THE TIME OF THE ORIGINAL CLASS LITIGATION OR IN LIGHT OF EVENTS YEARS AFTER IT HAS BECOME FINAL AND ALL OF THE SETTLEMENT PROCEEDS HAVE BEEN DISBURSED.

Even if *res judicata* does not bar further consideration of the question of adequacy of representation, the Second Circuit committed a fundamental error in the way it conducted that inquiry. Rather than adjudicating the collateral attack by examining the adequacy of representation question from the perspective of the time when the class was certified and the trial and appellate courts determined that representation of all class members was adequate, the court assessed the issue from today's perspective. Thus, it viewed the facts and applied the law as they now exist, with the benefit of hindsight, (a) concluding that it now appears that other class members in fact achieved different or greater benefits under the settlement than did these plaintiffs, and (b) assessing the legal issue on the basis of intervening changes in the law. In so doing, it rendered a decision that is especially destabilizing.

1. The Ninth Circuit in *Epstein* correctly concluded that fair procedures at the time of certification and settlement accord full due process to nonnamed class members, and that under such procedures the adequacy of representation is of course judged at the time they are employed. 179 F.3d at 648-49 (per O'Scannlain, J.) ("'[T]here has been a failure of due process only in those cases where it cannot be said that *the procedure adopted*, fairly insures the protection of the interests of absent parties who are to be bound by it.'") (quoting *Hansberry* v. *Lee*, 311 U.S. 32, 42 (1940)); *see also Nottingham Partners*, 925 F.2d at 33 (concluding that if proper procedures were employed by the certifying court, objections to an allegedly erroneous class determination had to be remedied on direct appeal on a petition for certiorari, and not by recourse to collateral attack in "the vain pursuit of backdoor relief"); *Grimes*, 17 F.3d at 1558 (opportunity to appeal and then seek a writ of certiorari to review adverse class determination provided "all the process that was due").

The Second Circuit in this case appears to have concluded that the assessment of adequacy can and should be made *post hoc*, based on the outcomes for individual class members. The court reasoned that even though it had "previously concluded that there was adequate representation of all class members in the original *Agent Orange* settlement," (App. 13a), and then later reaffirmed that conclusion in *Ivy/Hartman*, respondents had not in fact been adequately represented, and were therefore "not proper parties" to the class action and "cannot be bound by the settlement" because—as it turned out—their claimed illnesses manifested themselves after the funds available under the settlement for direct cash payments to veterans had been exhausted. App. 20a.

The court of appeals reached this conclusion even though, when the settlement was approved in 1984, all persons who were then "exposure-only" class members were situated similarly. That is to say, in 1984 no one could know

which class members would ultimately manifest symptoms, or when those symptoms would manifest. What was known in 1984—besides the fact that some class members would likely become ill in the subsequent years, that some number of those class members would attribute their illnesses to Agent Orange exposure, and that no class member had a promising legal claim of any sort—was that the claims of class members first manifesting symptoms after 1994 would be just like those of class members whose symptoms had surfaced earlier, only even weaker on account of the additional obstacles in proving causation. *See In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1396, 1418 (E.D.N.Y. 1985) (observing that "disabilities or deaths occurring many years after service in Vietnam, or among older veterans for whom the background incidence is higher, have a relatively diminished connection with Agent Orange exposure in terms of both public perception and the likelihood of intervening or contributing causes"), *aff'd in relevant part*, 818 F.2d 179 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988).

2. Moreover, in concluding that adequacy of representation had to be judged in light of this Court's decisions in *Amchem* and *Ortiz*—decisions handed down many years after the *Agent Orange* settlement became final (and that themselves arose on direct review)—the court of appeals held also that collateral attacks are properly judged on a hindsight view of any intervening changes in the *law*. That was clear error, and one that threatens to unsettle longstanding principles of finality.

To be sure, in resolving cases on direct review in which final judgment has not been rendered, it is appropriate to apply new judicial interpretations retroactively. *See, e.g.*, *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases *still open on direct review* and as to all events, regardless of

whether such events predate or postdate our announcement of the rule.") (emphasis added). The rule adopted by the Second Circuit, however, completely disregards the well-established "limitation inherent in the principle [of retroactivity] itself"—that "[n]ew legal principles, even when applied retroactively, do not apply to cases already closed." *Reynoldsville Casket Co.* v. *Hyde*, 514 U.S. 749, 758 (1995). Indeed, even in the criminal law, where matters of life and death may be at stake, the Court has refused to let even new constitutional interpretations serve as a basis for a collateral attack on a judgment. *See, e.g., Teague* v. *Lane*, 489 U.S. 288 (1989), and its progeny.

The reasons for this limitation are not difficult to understand. In the first place, under a contrary rule virtually any opinion of this Court could reopen countless final judgments, undermining the fundamental interest in finality. Moreover, unlike the situation presented on direct appeal of a proposed class action settlement (the procedural posture of both *Amchem* and *Ortiz*)—when any judicial errors can be corrected before settlement proceeds are paid out—challenges made only after the time for direct appeal has expired come too late to restore the defendants to their pre-settlement position. The defendants thus do not get the benefit for which they bargained during settlement and paid for (here, to the tune of $180 million); they cannot be placed in the position they would have occupied had there been no settlement or had the settlement been judicially disapproved during direct review, for the settlement proceeds cannot be recouped.

This case well illustrates the problem. With the explicit approval of the district court and the court of appeals, petitioners relied on the seemingly final determination that all potential claimants who did not opt out had been adequately represented—and therefore that the settlement assured them complete peace from further litigation. Indeed, as Judge Posner has recognized, when it is impossible to restore the parties in class action litigation to their pre-settlement positions (*e.g.*, because the settlement proceeds have been disbursed by the defendants and spent by class members), allowing litigation to recommence strips from the defendants the protections for which they bargained in agreeing to settle the litigation, and in doing so violates the *defendants'* due process rights. *See In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 159 F.3d 1016, 1019 (7th Cir. 1998).

3. Thus, even if *Amchem* and *Ortiz*, correctly understood, might have caused Judge Weinstein to decline to certify a class in the *Agent Orange* litigation had the class certification question been first presented to him today (and even that proposition is highly dubious[6]), they certainly cannot

[6] For example, in *Amchem* and *Ortiz* conflicts of interests inhered between class members with strong claims and those with weaker claims, quite unlike the *Agent Orange* litigation, in which the district court and court of appeals both observed that all class members had the same "dim prospects of success" as a consequence of the common barriers to recovery. *See In re Agent Orange Prod. Liab. Litig.*, 996 F.2d at 1437 (2d Cir. 1993). (Unlike with Agent Orange, courts and juries have repeatedly found that asbestos has caused injuries to plaintiffs.) As this Court recognized, the settlement negotiations at issue in *Amchem* regarding "essential allocation decisions" demonstrated a lack of "structural assurance of fair and adequate representation" for both present and future claimants. *Amchem*, 521 U.S. at 627. Indeed, in both *Amchem* and *Ortiz*, adequacy of representation was called into serious question by the class representatives' attorneys' negotiation of allocation issues with defense counsel. In the *Agent Orange* litigation, by contrast, Petitioners negotiated a lump-sum settlement with the class and then stepped back so that the district court could make a neutral determination of how to allocate the proceeds most fairly among the commonly-represented members.

Moreover, *Amchem* and *Ortiz*, being asbestos cases, involved a substantial problem that numerous "exposure-only" class members may not have known of their exposure until long after the date of the settlement; in contrast, the *Agent Orange* class of military veterans who served in Vietnam between specified dates cannot sensibly be described as similarly "unselfconscious and amorphous." *Id.* at 628. Finally, *Amchem* involved a class that was certified solely for purposes of settlement, a fact that warrants additional judicial scrutiny, and the class members in *Ortiz* were not permitted to opt out. *See id.* at 620 (noting that a court asked to

justify upsetting a judgment that became final 13 years before the first of those two cases was decided. As this Court admonished in *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981), "the *res judicata* consequences of a final, unappealed judgment on the merits" are not "altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *See also id.* at 403 (Blackmun, J., concurring) (acknowledging the existence of a "special need for strict application of *res judicata* in complex multiple party actions . . . so as to discourage 'break-away' litigation"); *Reynoldsville Casket*, *supra*, 514 U.S. at 758 (noting that new legal principles do not apply to closed cases); *Durfee* v. *Duke*, 375 U.S. 106, 110 (1963) (holding that collateral attacks on subject-matter jurisdiction are precluded if the issue was fully and fairly litigated and finally decided by the court that entered the judgment).

It is simply no answer to respond, as the court below did, (App. 16a), that respondents "do not attack the merits or finality of the settlement itself, but instead argue that they were not proper parties to that judgment," and that petitioners are not exposed to new and duplicative liability "if plaintiffs were never proper parties to the prior judgment in the first place." As then-District Judge Patrick Higginbotham observed:

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certify a settlement-only class "will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold"); *Ortiz*, 527 U.S. at 845-47 (noting that mandatory class actions raise Seventh Amendment issues and magnify significantly the usual tensions between representative and individual litigation). Here, in contrast, the definition of the class was fixed as a part of litigation at the time the settlement was negotiated and the class settlement notice was sent out, and class members had the right to opt out, a right that hundreds of class members exercised (only later to suffer summary judgment on the merits).

> [A]dequacy of representation does not revolve around whether the various class members receive the relief they seek. If class members could sit back and see whether the court awards them a desirable judgment and then attack the judgment collaterally if unsatisfied with the award they receive, the purpose of *res judicata* would be undermined and class action defendants would be placed in a precarious and unfair position. Due process entitles class members to notice and to adequate representation. It does not entitle them to continue to challenge the defendant's conduct until they are ultimately successful.

Quigley v. *Braniff Airways, Inc.*, 85 F.R.D. 74, 76-77 (N.D. Tex. 1979). In summary, the proper answer to the question as phrased by the court below—"the effect of . . . *Amchem* . . . and *Ortiz* . . . on a previously settled class action" for which the time for direct review has expired (App. 1a-2a)—must be "none."

III. THE QUESTIONS PRESENTED ARE IMPORTANT.

The Second Circuit's decision is not simply incorrect; if permitted to stand, it would seriously impair the class action device. Under the Second Circuit's rule, settlement of a class action upon a finding, explicitly upheld on appeal, that nonnamed class members were adequately represented signals not the end of the litigation, but merely the beginning of a new stage of litigation. During that new stage, the defendant must face the distinct possibility of numerous collateral attacks, potentially from any class member who turns out to be dissatisfied with the outcome of the original action and wishes to escape its binding effect (or, more realistically, to induce the defendant to offer to settle in exchange for additional payments that will inure to him or her alone). Simply put, the Second Circuit's decision ensures that defendants cannot settle with confidence that they have achieved peace

from further litigation. In creating this unjustified exception to this Court's repeated admonitions about the importance of repose and finality in litigation, the Second Circuit's ruling portends class action litigations that, for all intents and purposes, will never end.

Consequently, the rule adopted by the Second Circuit would defeat the important public interest in encouraging the settlement of class actions. Although the courts of appeals have consistently noted that the public interest favoring the settlement of litigation is even stronger in the context of class action litigation, *see, e.g.*, *Bano* v. *Union Carbide Corp.*, 273 F.3d 120, 129 (2d Cir. 2001); *In re Exxon Valdez*, 229 F.3d 790, 795 (9th Cir. 2000), the holding of this case substantially disserves that interest. Under the Second Circuit's rule, the purported "settlement" of a class action is final and binding on defendants, but not on members of the plaintiff class who turn out to be dissatisfied with what they receive under the settlement, even if they received constitutionally adequate notice and failed to opt out of the class or object to the settlement. *See, e.g.*, Marcel Kahan & Linda Silberman, Matsushita *and Beyond*, 1996 S. Ct. Rev. at 270 (noting the opportunity for forum shopping that would be afforded by a rule allowing a broad right to collaterally attack determinations of adequate representation). The Second Circuit's rule disregards the fact that defendants in class actions have a vital interest in "seeing the entire plaintiff class bound by *res judicata* just as [they are] bound." *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 805 (1985). If defendants in class actions cannot gauge whether and to what extent settlements will be final, settlements will be inhibited to an extraordinary degree.

Here, the settlement negotiated to terminate the *Agent Orange* litigation, and approved by the district court and the Second Circuit, was explicitly premised on it being the last word on respondents' liability to all class members who did not opt out. Had the settlement not covered all class members, there would have been no settlement. And "[h]ad there been no settlement, there would have been no recovery for [any of] the veterans." App. 39a. And even if Judge Weinstein's finding that all class members were adequately represented was an abuse of discretion (which, as the Second Circuit held, it was not), the time to seek relief from that finding passed many years before respondents filed their lawsuits.

Because the decision below creates a circuit split with respect to issues of profound import to the consensual resolution of class actions, and because neither due process nor the Federal Rules of Civil Procedure require the deleterious consequences of the ruling below, that ruling should not go unreviewed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AUGUST 2002

APPENDICES

APPENDIX A

United States Court of Appeals,
Second Circuit

Daniel Raymond STEPHENSON, Susan Stephenson, Daniel Anthony Stephenson, Emily Elizabeth Stephenson, Joe Isaacson and Phyllis Lisa Isaacson,
Plaintiffs-Appellants,

v.

DOW CHEMICAL CO., Monsanto Co., American Home Products, Inc., Hercules Incorporated, Occidental Chemical Corporation, Ultramar Diamond, Chemical Land Holdings, Inc., Maxus Energy Corp., Harcros Chemical Inc., Shamrock Corp., and Does 1-100, Thompson Hayward Chemical Co., T-H Agriculture & C.D.U. Holding, Inc., Uniroyal Chemical Co.,
Defendants-Appellees.

Docket Nos. 00-7455(L), 00-9120(CON).

Argued May 23, 2001.
Decided Nov. 30, 2001.

[273 F.3d 249]

Before: CARDAMONE and F.I. PARKER, Circuit Judges, and SPATT, District Judge.*

PARKER, Circuit Judge.

This appeal requires us to determine the effect of the Supreme Court's landmark class action decisions in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138

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* The Honorable Arthur D. Spatt, of the United States District Court for the Eastern District of New York, sitting by designation.

L.Ed.2d 689 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999), on a previously settled class action concerning exposure to Agent Orange during the Vietnam War. Daniel Stephenson and Joe Isaacson are two Vietnam War veterans who allege that they were injured by exposure to Agent Orange while serving in the military in Vietnam. In the late 1990s, Stephenson and Isaacson (along with their families) filed separate lawsuits against manufacturers of Agent Orange. These lawsuits were eventually transferred to Judge Jack B. Weinstein in the Eastern District of New York by the Judicial Panel on Multidistrict Litigation ("MDL Panel").

In 1984, however, some twelve years before these suits, virtually identical claims against these defendants, brought by a class of military personnel who were exposed to Agent Orange while in Vietnam between 1961 and 1972, were globally settled. The Isaacson and Stephenson actions were brought in 1998 and 1999 respectively. Judge Weinstein, who presided over the 1984 settlement, dismissed the claims of Stephenson and Isaacson, concluding that the prior settlement barred their suits. On appeal, plaintiffs chiefly contend, citing *Amchem* and *Ortiz*, that they were inadequately represented and, therefore, due process considerations prevent the earlier class action settlement from precluding their claims. Because we agree that *Amchem* and *Ortiz* prevent applying res judicata to bar plaintiffs' claim, we vacate the district court's dismissal and remand for further proceedings.[1]

I. BACKGROUND

A. *Prior Agent Orange Litigation*

The Agent Orange class action litigation has a lengthy and complicated history, [252] which we set forth in some detail below in order to convey the magnitude of this decision.

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[1] Trial Lawyers for Public Justice, as *amicus curiae*, filed a brief in support of the plaintiffs' position.

The first Agent Orange litigation began in the late 1970s, when individual veterans and their families filed class action suits in the Northern District of Illinois and Southern and Eastern Districts of New York, alleging that exposure to Agent Orange caused them injury. *In re "Agent Orange" Prod. Liab. Litig.*, 635 F.2d 987, 988 (2d Cir.1980) ("*Agent Orange I*"). By order of the MDL Panel, these actions were transferred to the Eastern District of New York and consolidated for pretrial purposes. *Id.* Plaintiffs asserted claims of negligent manufacture, strict liability, breach of warranty, intentional tort and nuisance. *In re "Agent Orange" Prod. Liab. Litig.*, 597 F.Supp. 740, 750 (E.D.N.Y.1984) ("*Agent Orange III* "); *aff'd* 818 F.2d 145 (2d Cir.1987).

In 1983, the district court certified the following class under Federal Rule of Civil Procedure 23(b)(3):

> those persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides, including those composed in whole or in part of 2, 4, 5-trichlorophenoxyacetic acid or containing some amount of 2, 3, 7, 8-tetrachlorodibenzo-p-dioxin. The class also includes spouses, parents, and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure.

In re "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 729 (E.D.N.Y.1983) ("*Agent Orange II*"). To support class certification, the district court specifically found:

> (1) that the affirmative defenses [including the "military contractor" defense] and the question of general causation are common to the class, (2) that those questions predominate over any questions affecting individual members, and (3) given the enormous potential size of plaintiffs' case and the judicial economies that would result from a class trial, a

> class action is superior to all other methods for a "fair and efficient adjudication of the controversy."

Id. at 724. The court also ordered notice by mail, print media, radio and television to be provided to class members, providing in part that persons who wished to opt out must do so by May 1, 1984. *Id. at 729-32.*

Trial of the class claims was to begin on May 7, 1984. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 154 (2d Cir.1987) ("*Agent Orange V*"). On the eve of trial, the parties reached a settlement. *Agent Orange III*, 597 F.Supp. at 746. The settlement provided that defendants would pay $180 million into a settlement fund, $10 million of which would indemnify defendants against future state court actions alleging the same claims. *See id.* at 863-65. The settlement provided that "[t]he Class specifically includes persons who have not yet manifested injury." *Id.* at 865. Additionally, the settlement specifically stated that the district court would "retain jurisdiction over the Fund pending its final disposition." *Id.* at 866.

The district court held fairness hearings throughout the country, and approved the settlement as fair, reasonable and adequate. *See id.* at 746-47; *see also Ryan v. Dow Chem. Co. (In re "Agent Orange" Prod. Liab. Litig.)*, 618 F.Supp. 623 (E.D.N.Y.1985) (approving final settlement and dismissing merits). The court rejected the motion to certify a subclass of those class members who objected to terms of the settlement. *Agent Orange III*, 597 F.Supp. at 757. The court concluded that "[n]o purpose would have been served by [253] appointing counsel for a subclass of disappointed claimants except to increase expenses to the class and delay proceedings."[2] *Id.*

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[2] The district court had earlier rejected a motion to establish a plaintiff's steering committee, reasoning that lead counsel had expressed willingness to "consider all ideas and suggestions submitted by attorneys for separate plaintiffs." *In re "Agent Orange" Prod. Liab. Litig.*, 534 F.Supp. 1046, 1052-53 (E.D.N.Y.1982).

Seventy-five percent of the $180 million was to be distributed directly "'to exposed veterans who suffer from long-term total disabilities and to the surviving spouses or children of exposed veterans who have died.'" *Agent Orange V*, 818 F.2d at 158. "A claimant would qualify for compensation by establishing exposure to Agent Orange and death or disability not 'predominately' caused by trauma...." *Id.* Payments were to be made for ten years, beginning January 1, 1985 and ending December 31, 1994:

> No payment will be made for death or disability occurring after December 31, 1994. Payment will be made for compensable deaths occurring both before and after January 1, 1985. Payments will be made for compensable disability to the extent that the period of disability falls within the ten years of the program's operation.

Ryan v. Dow Chem. Co. (In re "Agent Orange" Prod. Liab. Litig.), 611 F.Supp. 1396, 1417 (E.D.N.Y.1985) ("*Agent Orange IV*"), *rev'd in part on other grounds, In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 179 (2d Cir.1987) ("*Agent Orange VI*"). "Most of the remaining [25%] of the settlement fund established the Agent Orange Class Assistance Program, ... which made grants to agencies serving Vietnam veterans and their families." *Ivy v. Diamond Shamrock Chems. Co. (In re "Agent Orange" Prod. Liab. Litig.)*, 996 F.2d 1425, 1429-30 (2d Cir.1993) ("*Ivy/Hartman II*"). Explaining the creation of this kind of fund, Judge Weinstein stated that it was "[t]he most practicable and equitable method of distributing benefits to" those claimants who did not meet eligibility criteria for cash payments. *Agent Orange IV*, 611 F.Supp. at 1431.

We affirmed class certification, settlement approval and much of the distribution plan. *See Agent Orange V*, 818 F.2d 145, 163-74 (approving settlement and class certification); *Agent Orange VI*, 818 F.2d 179, 184-86 (reversing only the portion of distribution plan that allowed an independent

foundation to monitor the funding of projects to assist the class, but allowing district court to establish and supervise such a fund). We rejected challenges to class certification, concluding that "class certification was justified under Rule 23(b)(3) due to the centrality of the military contractor defense." *Agent Orange V*, 818 F.2d at 166-67. We specifically rejected an attack based on adequacy of representation, again based on the military contractor defense which, we reasoned, "would have precluded recovery by all plaintiffs, irrespective of the strengths, weaknesses, or idiosyncrasies of their claims." *Id.* at 167. We additionally concluded that the notice scheme devised by Judge Weinstein was the "best notice practicable" under Federal Rule of Civil Procedure 23(c)(2). *Id.* at 167-69. Finally, we affirmed the settlement as fair, reasonable and adequate, given the serious weaknesses of the plaintiffs' claims. *See id.* at 170-74.

In 1989 and 1990, two purported class actions, *Ivy v. Diamond Shamrock Chemicals Co.* and *Hartman v. Diamond Shamrock Chemicals Co.*, were filed in Texas state courts. *Ivy/Hartman II*, 996 F.2d at 1430. These suits, on behalf of Vietnam [254] veterans exposed to Agent Orange,[3] sought compensatory and punitive damages against the same companies as in the settled suit. *See Ivy/Hartman I*, 781 F.Supp. at 912-13. The plaintiffs alleged that their injuries manifested only after the May 7, 1984 settlement. *See id.* Additionally, the *Ivy/Hartman* plaintiffs expressly disclaimed any reliance on federal law, asserting only state law claims. *See id.* Nonetheless, the defendants removed the actions to federal court on the grounds that these claims had already been

[3] Two plaintiffs in the *Ivy* litigation alleged injuries stemming from Agent Orange exposure while acting in a civilian capacity, and thus were not members of the class bound by the 1984 settlement. Their claims were severed from the claims of the other plaintiffs. *See Ryan v. Dow Chem. Co. (In re "Agent Orange") Prod. Liab. Litig.*, 781 F.Supp. 902, 914 (E.D.N.Y.1991) ("*Ivy/Hartman I*"); *aff'd sub nom Ivy v. Diamond Shamrock Chem. Co. (In re "Agent Orange" Prod. Liab. Litig.)*, 996 F.2d 1425 (2d Cir.1993).

asserted and litigated in federal court. *See id.* at 913. The MDL Panel transferred the actions to Judge Weinstein in the Eastern District of New York. *See Ivy/Hartman II*, 996 F.2d at 1430.

The district court rejected plaintiffs' motion to remand, reasoning that it had jurisdiction over the class action because it "ha[d] authority to ensure that [its prior orders] and the Settlement Agreement [were] enforced," especially given the injunction it issued enjoining all class members from commencing any action arising out of Agent Orange exposure. *Ivy/Hartman I*, 781 F.Supp. at 914, 916. In support of its decision, the district court cited the All-Writs Act, 28 U.S.C. § 1651 (1994), which authorizes writs "necessary or appropriate" in aid of its jurisdiction. *See id.* at 918.

The district court then turned to the plaintiffs' substantive arguments that it was unfair to bind them to the settlement when their injuries were not manifested until after the settlement had been reached. The district court rejected this argument, based on the following reasoning:

> All of the courts which considered the *Agent Orange* Settlement were fully cognizant of the conflict arguments now hypothesized by the plaintiffs and took steps to minimize the problem in the way they arranged for long-term administration of the Settlement Fund.
>
> In many cases the conflict between the interests of present and future claimants is more imagined than real. In the instant case, for example, the injustice wrought upon the plaintiffs is nonexistent. *These plaintiffs, like all class members who suffer death or disability before the end of 1994, are eligible for compensation from the Agent Orange Payment Fund.* The relevant latency periods and the age of the veterans ensure that almost all valid claims will be revealed before that time.

> Even when it is proper and necessary for the courts to be solicitous of the interests of future claimants, the courts cannot ignore the interests of presently injured plaintiffs as well as defendants in achieving a settlement. Class action settlements simply will not occur if the parties cannot set definitive limits on defendants' liability. Making settlement of Rule 23 suits too difficult will work harms upon plaintiffs, defendants, the courts, and the general public.

Id. at 919-20 (emphasis added). The district court therefore dismissed the *Ivy/Hartman* litigation.

We affirmed the district court's dismissal. *Ivy/Hartman II*, 996 F.2d 1425, 1439. We agreed with the district court's assertion [255] of federal jurisdiction under the All Writs Act and held:

> A district court, in exceptional circumstances, may use its All Writs authority to remove an otherwise unremovable state court case in order to "effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained."

Id. at 1431 (quoting *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 172, 98 S.Ct. 364, 54 L.Ed.2d 376 (1977)).

We then addressed plaintiffs' argument that they were not members of the prior class, because they were not "injured" as the term was used in the class definition. *Id.* at 1433. We concluded that, for the purposes of the Agent Orange litigation, "injury occurs when a deleterious substance enters a person's body, even though its adverse effects are not immediately apparent." *Id.* at 1433-34. We emphasized that the plaintiffs in the original suit had sought to include such "at-risk" plaintiffs, over defendants' objections, and that we had already affirmed the inclusion of these plaintiffs in the class. *See id.*

We likewise rejected plaintiffs' argument that their due process rights were violated because they were denied ade-

quate representation and adequate notice in the prior action. *See id.* at 1435-36. We reasoned that "providing individual notice and opt-out rights to persons who are unaware of an injury would probably do little good." *Id.* at 1435. We concluded that the plaintiffs were adequately represented in the prior action, and that a subclass of future claimants was unnecessary "'because of the way [the settlement] was structured to cover future claimants.'" *Id.* at 1436 (quoting *Ivy/Hartman I*, 781 F.Supp. at 919)(alteration in original).

Shortly before our decision in *Ivy/Hartman II*, the $10 million set aside for indemnification from state court Agent Orange judgments was transferred to the Class Assistance Program, because the district court deemed such a fund unnecessary. The distribution activities had begun in 1988, and concluded in June 1997. During the ten year period of the settlement, $196.5 million was distributed as cash payments to approximately 52,000 class members. The program paid approximately $52 million to "after-manifested" claimants, whose deaths or disabilities occurred after May 7, 1984. Approximately $71.3 million of the fund was distributed through the Class Assistance Program.

B. *The Instant Litigation*

1. *The Parties*

Daniel Stephenson served in Vietnam from 1965 to 1970, serving both on the ground in Vietnam and as a helicopter pilot in Vietnam. He alleges that he was in regular contact with Agent Orange during that time. On February 19, 1998, he was diagnosed with multiple myeloma, a bone marrow cancer, and has undergone a bone marrow transplant.

Joe Isaacson served in Vietnam from 1968 to 1969 as a crew chief in the Air Force, and worked at a base for airplanes which sprayed various herbicides, including Agent Orange. In 1996, Isaacson was diagnosed with non-Hodgkins lymphoma.

Defendants are chemical manufacturers who produced and sold to the United States Government the herbicide Agent Orange during the Vietnam War.

2. *Proceedings Below*

In August 1998, Isaacson filed suit in New Jersey state court, asserting claims only under state law. Defendants quickly removed the case to federal court and Isaacson's subsequent motion to remand was denied by Chief Judge Anne Thompson in the District of New Jersey. Thereafter, [256] Isaacson's case was transferred to Judge Weinstein by the MDL Panel.

Stephenson filed his suit *pro se* in the Western District of Louisiana in February 1999, but he soon retained his current counsel. In April 1999, defendants moved for and were granted a Conditional Transfer Order by the MDL Panel, transferring this action to Judge Weinstein. After Stephenson's case was transferred, it was consolidated with the Isaacson case.

Defendants moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), asserting that plaintiffs' claims were barred by the 1984 class action settlement and subsequent final judgment. Judge Weinstein granted this motion from the bench following argument, rejecting plaintiffs' argument that they were inadequately represented and concluding that plaintiffs' suit was an impermissible collateral attack on the prior settlement.

Because we disagree with this conclusion, based on the Supreme Court's holdings in *Amchem* and *Ortiz*, we must vacate the district court's dismissal and remand for further proceedings.

II. DISCUSSION

"We review a dismissal under Rule 12(b)(6) *de novo*, accepting all factual allegations in the complaint as true and drawing all reasonable inferences in the plaintiffs' favor." *Ganino v. Citizens Utilities Co.*, 228 F.3d 154, 161 (2d Cir.2000).

A. *Removal Jurisdiction*

The Isaacson appellants contend that Isaacson's case should have been remanded for lack of federal jurisdiction. Isaacson initially filed suit in New Jersey state court, alleging only claims under state law. Defendants removed his case to the District of New Jersey, where Isaacson's subsequent motion to remand was denied.

The district court based removal jurisdiction on the All Writs Act, *28 U.S.C. § 1651*,[4] and concluded that the court best suited to determine the settlement's preclusive effect would be the court that approved the settlement. *Ivy/Hartman I*, 781 F.Supp. at 918.

"A district court, in exceptional circumstances, may use its All Writs authority to remove an otherwise unremovable ... case in order to 'effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained.'" *Ivy/Hartman II*, 996 F.2d at 1431 (quoting *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 172, 98 S.Ct. 364, 54 L.Ed.2d 376 (1977)). In *Ivy/Hartman II*, we concluded that such exceptional circumstances warranted removal jurisdiction in that case because "[i]f Agent Orange victims were allowed to maintain separate actions in state court, the deleterious effect on the ... settlement mechanism would be substantial." *Id.* Isaacson contends that this case, however, presents no such "exceptional circumstances," because the settlement fund no longer exists.

We disagree. Although the settlement funds are now depleted, maintenance of these actions in state court necessarily requires interpretation of the scope of the Agent Or-

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[4] This section provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

ange Settlement and could have the potential to disturb the judgment underlying the settlement depending on the position taken by defendants. Although we ultimately hold that Isaacson's suit is not precluded by the settlement judgment, removal and transfer were appropriate simply for the purpose of determining the [257] settlement's preclusive effect.[5] Indeed, the court "best situated to make this determination" is the court that entered judgment. *Id.* This conclusion is not altered by our determination that the district court here erred.

B. *Collateral Attack*

The parties devote much energy to debating the permissibility of a collateral attack in this case. Plaintiffs assert that, since the Supreme Court's decision in *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940), courts have allowed collateral attacks on class action judgments based upon due process concerns. Defendants strenuously disagree and contend that to allow plaintiffs' suit to go forward, in the face of the 1984 global settlement, would "violate defendants' right to due process of law." Appellees' Br. at 39. Defendants likewise strenuously argue that the district court's injunction against future litigation prevents these appellants from maintaining their actions. While it is true that

[5] In *Ivy/Hartman II*, this Court noted that "[i]t is difficult to conceive of any state court properly addressing a victim's tort claim without first deciding the scope of the *Agent Orange I* class action and settlement." *Ivy/Hartman II*, 996 F.2d at 1431. Whether or not funds from the original settlement pool remained available for these victims, a state court could not consider the merits of the plaintiffs' cases without first deciding whether the original Agent Orange Settlement Agreement addressed (and therefore now precluded) their claims. As we held in *Ivy/Hartman II*, "[t]he court best situated [to determine whether a plaintiff's claim is barred by the original settlement] is the court that approved the settlement and entered [the] judgment enforcing it." *Id.* Although we express no opinion as to whether maintenance of these actions in the state court would actually disturb the settlement, we find the need for interpretation of the settlement and the possibility of such disturbance a sufficient basis for the "extraordinary circumstances" warranting removal under the All Writs Act.

"[a]n injunction must be obeyed until modified or dissolved, and its unconstitutionality is no defense to disobedience," *Met. Opera Ass'n. v. Local 100, Hotel Employees and Rest. Employees Int'l Union*, 239 F.3d 172, 176 (2d Cir.2001) (citing *Walker v. Birmingham*, 388 U.S. 307, 314-21, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967)), defendants' injunction-based argument misses the point. The injunction was part and parcel of the judgment that plaintiffs contend failed to afford them adequate representation. If plaintiffs' inadequate representation allegations prevail, as we so conclude, the judgment, which includes the injunction on which defendants rely, is not binding as to these plaintiffs.

Defendants contend that Supreme Court precedent permits a collateral attack on a class action judgment "only where there has been no prior determination of absent class members' due process rights." Appellees' Br. at 40. According to defendants, because the "due process rights of absent class members have been extensively litigated in the *Agent Orange* litigation," Appellees' Br. at 44, these plaintiffs cannot now attack those prior determinations. We reject defendants' arguments and conclude that plaintiffs' collateral attack, which seeks only to prevent the prior settlement from operating as res judicata to their claims, is permissible.

First, even if, as defendants contend, collateral attack is only permitted where there has been no prior determination of the absent class members' rights, plaintiffs' collateral attack is allowed. It is true that, on direct appeal and in the *Ivy/Hartman* litigation, we previously concluded that there was adequate representation of all class members in the original *Agent Orange* settlement. However, neither this Court nor the district court has addressed [258] specifically the adequacy of representation for those members of the class whose injuries manifested after depletion of the settlements funds. *See Ivy/Hartman II*, 996 F.2d at 1436 (creating a subclass of future claimants was unnecessary because the settlement covered such claimants); *Ivy/Hartman I*, 781 F.Supp. at 919 ("These plaintiffs, like all class members *who suffer*

death or disability before the end of 1994, are eligible for compensation from the Agent Orange Payment Fund." (emphasis added.)) Therefore, even accepting defendants' argument, plaintiffs' suit can go forward because there has been no prior adequacy of representation determination with respect to individuals whose claims arise after the depletion of the settlement fund.[6]

Second, the propriety of a collateral attack such as this is amply supported by precedent. In *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940), the Supreme Court entertained a collateral attack on an Illinois state court class action judgment that purported to bind the plaintiffs. The Court held that class action judgments can only bind absent class members where "the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation." *Id.* at 41, 61 S.Ct. 115; *cf. Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) ("[I]t is true that a court adjudicating a dispute may not be able to predetermine

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[6] Defendants rely heavily on a recent Ninth Circuit decision, *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir.1999), in support of their limited collateral review theory. *Epstein* held that a collateral attack is available only "to consider whether the procedures in the prior litigation afforded the party against whom the earlier judgment is asserted a 'full and fair opportunity' to litigate the claim or issue." *Id.* at 648-49. According to the Ninth Circuit,

> Due process requires that an absent class member's right to adequate representation be protected by the adoption of the appropriate procedures by the certifying court and by the courts that review its determinations; due process does not require collateral second-guessing of those determinations and that review.

Id. at 648. Here, neither the district court nor this Court has determined the adequacy of representation *with respect to these plaintiffs* whose injuries did not arise until after the settlement expired. Without adopting the Ninth Circuit's decision in *Epstein*, we conclude that plaintiffs' collateral attack is proper even under its standard.

the res judicata effect of its own judgment."). Additionally, we have previously stated that a "[j]udgment in a class action is not secure from collateral attack unless the absentees were adequately and vigorously represented." *Van Gemert v. Boeing Co.*, 590 F.2d 433, 440 n. 15 (2d Cir.1978); *aff'd* 444 U.S. 472, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980).

Allowing plaintiffs' suit would be consistent with many other circuit decisions recognizing the ability of later plaintiffs to attack the adequacy of representation in an earlier class action. For example, the Fifth Circuit holds:

> To answer the question whether the class representative adequately represented the class so that the judgment in the class suit will bind the absent members of the class requires a two-pronged inquiry: (1) Did the trial court in the first suit correctly determine, initially, that the representative would adequately represent the class? and (2) Does it appear, after the termination of the suit, that the class representative adequately protected the interest of the class? The first question involves us in a *collateral review* of the ... [trial] court's determination to permit the suit to proceed as a class action with [the named plaintiff] as [259] the representative, while the second involves a review of the class representative's conduct of the entire suit--an inquiry which is not required to be made by the trial court but which is appropriate in a collateral attack on the judgment....

Gonzales v. Cassidy, 474 F.2d 67, 72 (5th Cir.1973); *see also Williams v. Gen. Elec. Capital Auto Lease, Inc.*, 159 F.3d 266 (7th Cir.1998) (addressing due process considerations of prior class action settlement on collateral attack); *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1226 (11th Cir.1998) ("Before the bar of claim preclusion may be applied to the claim of an absent class member, it must be demonstrated that invocation of the bar is consistent with due process, and

an absent class member may collaterally attack the prior judgment on the ground that to apply claim preclusion would deny him due process."); *Crawford v. Honig*, 37 F.3d 485, 488 (9th Cir.1994) (finding that when absent class members were not adequately represented in a post- settlement modification of a class-wide injunction, "res judicata did not bar them from collaterally attacking the [modification] proceedings") (citation omitted).

Defendants' citation to *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981), is unavailing. According to that case, a "judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause [of action]." *Id.* at 398, 101 S.Ct. 2424 (alteration in original). Defendants' reliance on this case misperceives plaintiffs' argument. Plaintiffs do not attack the merits or finality of the settlement itself, but instead argue that they were not proper parties to that judgment. If plaintiffs were not proper parties to that judgment, as we conclude below, res judicata cannot defeat their claims. Further, such collateral review would not, as defendants maintain, violate defendants' due process rights by exposing them to double liability. Exposure to liability here is not duplicative if plaintiffs were never proper parties to the prior judgment in the first place.

We therefore hold that a collateral attack to contest the application of res judicata is available. We turn next to the merits of this attack.

C. *Due Process Considerations and Res Judicata*

The doctrine of res judicata dictates that "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 466 n. 6, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982). Res judicata ordinarily applies "if the earlier decision was (1)

a final judgment on the merits, (2) by a court of competent jurisdiction, (3) in a case involving the same parties or their privies, and (4) involving the same cause of action." *Anaconda-Ericsson Inc. v. Hessen* (*In re Teltronics Servs., Inc.*), 762 F.2d 185, 190 (2d Cir.1985).

Plaintiffs' argument focuses on element number three in the res judicata analysis: whether they are parties bound by the settlement. Plaintiffs rely primarily on the United States Supreme Court's decisions in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999).

In *Amchem*, the Supreme Court confronted, on direct appeal, a challenge to class certification for settlement purposes in an asbestos litigation. The class defined in the complaint included both individuals [260] who were presently injured as well as individuals who had only been exposed to asbestos. *Amchem*, 521 U.S. at 602 n. 5, 117 S.Ct. 2231. The Supreme Court held that this "sprawling" class was improperly certified under Federal Rules of Civil Procedure 23(a) and (b). *Id.* at 622-28, 117 S.Ct. 2231. Specifically, the Court held that Rule 23(a)(4)'s requirement that the named parties "'will fairly and adequately protect the interests of the class'" had not been satisfied. *Id.* at 625-26, 117 S.Ct. 2231. The Court reasoned that

> named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. In significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure- only plaintiffs in ensuring an ample, inflation-protected fund for the future.

Id. at 626, 117 S.Ct. 2231.

Amchem also implied, but did not decide, that the notice provided to exposure-only class members was likewise inadequate. The Court stated that, because many exposure-only individuals, may not be aware of their exposure or realize the ramifications of exposure, "those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out." *Id.* at 627, 117 S.Ct. 2231.

In *Ortiz*, the Supreme Court again addressed a settlement-only class action in the asbestos litigation context. *Ortiz*, however, involved a settlement- only limited fund class under Rule 23(b)(1)(B). The Supreme Court ultimately held that the class could not be maintained under Rule 23(b)(1)(B), because "the limit of the fund was determined by treating the settlement agreement as dispositive, an error magnified" by conflicted counsel. *Ortiz*, 527 U.S. at 864, 119 S.Ct. 2295. In so holding, *Ortiz* noted that "it is obvious after *Amchem* that a class divided between holders of present and future claims (some of the latter involving no physical injury and attributable to claimants not yet born) requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel." *Id.* at 856, 119 S.Ct. 2295.

Res judicata generally applies to bind absent class members except where to do so would violate due process. *Gonzales*, 474 F.2d at 74. Due process requires adequate representation "at all times" throughout the litigation, notice "reasonably calculated ... to apprise interested parties of the pendency of the action," and an opportunity to opt out. *Shutts*, 472 U.S. at 811-12, 105 S.Ct. 2965.

Both Stephenson and Isaacson fall within the class definition of the prior litigation: they served in the United States military, stationed in Vietnam, between 1961 and 1972, and were allegedly injured by exposure to Agent Orange. However, they both learned of their allegedly Agent Orange- related injuries only after the 1984 settlement fund had expired

in 1994. Because the prior litigation purported to settle all future claims, but only provided for recovery for those whose death or disability was discovered prior to 1994, the conflict between Stephenson and Isaacson and the class representatives becomes apparent.[7] No provision was made for post-[261] 1994 claimants, and the settlement fund was permitted to terminate in 1994. *Amchem* and *Ortiz* suggest that Stephenson and Isaacson were not adequately represented in the prior Agent Orange litigation.[8] Those cases indicate that a class which purports to represent both present and future claimants may encounter internal conflicts.[9]

Defendants contend that there was, in fact, no conflict because all class members' claims were equally meritless and

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[7] Again, we distinguish the *Ivy/Hartman* cases, which held that pre 1994 claimants were adequately represented in the prior Agent Orange litigation. This conclusion was based, at least in part, on those claimants' eligibility for compensation from the settlement fund. *See Ivy/Hartman I*, 781 F.Supp. at 919; *Ivy/Hartman II*, 996 F.2d at 1435- 36.

[8] We also note that plaintiffs likely received inadequate notice. *Shutts* provides that adequate notice is necessary to bind absent class members. *Shutts*, 472 U.S. at 812, 105 S.Ct. 2965. As described earlier, *Amchem* indicates that effective notice could likely not ever be given to exposure-only class members. *Amchem*, 521 U.S. at 628, 117 S.Ct. 2231. Because we have already concluded that these plaintiffs were inadequately represented, and thus were not proper parties to the prior litigation, we need not definitively decide whether notice was adequate.

[9] Both *Amchem* and *Ortiz* addressed the possibility of internal conflicts in the limited context of settlement-only classes. For such certifications, *Amchem* held that internal conflicts would prevent adequate representation when the named plaintiffs (having present injuries) did not act with "a proper understanding of their representational responsibilities" towards class members whose injuries would surface later. *Amchem*, 521 U.S. at 627-28, 117 S.Ct. 2231. *Ortiz*, while recognizing the need for some limit to "reclassification with separate counsel," found that because of the lack of procedural safeguards like subclasses in the *Ortiz* certification, the settlement-only class presented could not adequately protect included future plaintiffs. *Ortiz*, 527 U.S. at 855-57, 864-65, 119 S.Ct. 2295 (noting that the application of Rule 23(b)(1)(B) to a plan addressing actual and potential tort claims is "subject to question").

would have been defeated by the "military contractor" defense. This argument misses the mark. At this stage, we are only addressing whether plaintiffs' claims should be barred by res judicata. We are therefore concerned only with whether they were afforded due process in the earlier litigation. Part of the due process inquiry (and part of the Rule 23(a) class certification requirements) involves assessing adequacy of representation and intra-class conflicts. The ultimate merits of the claims have no bearing on whether the class previously certified adequately represented these plaintiffs.

Because these plaintiffs were inadequately represented in the prior litigation, they were not proper parties and cannot be bound by the settlement. We therefore must vacate the district court's dismissal and remand for further proceedings. We, of course, express no opinion as to the ultimate merits of plaintiffs' claims.

III. CONCLUSION

For the foregoing reasons, we hold that the prior *Agent Orange* settlement does not preclude these plaintiffs from asserting their claims alleging injury due to Agent Orange exposure. Because these plaintiffs were inadequately represented in the prior litigation, based on the Supreme Court's teaching in *Amchem* and *Ortiz*, they were not proper parties to the litigation. We therefore vacate the district court's dismissal and remand the case to the district court for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK 10007

[ROSEANN B. MACKECHNIE, CLERK Letterhead]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 8th day of May two thousand two.

DANIEL RAYMOND STEPHENSON, SUSAN STEPHENSON, DANIEL ANTHONY STEPHENSON EMILY ELIZABETH STEPHENSON, JOE ISAACSON AND PHYLLIS LISA ISAACSON,
Plaintiffs-Appellants,

v.

DOW CHEMICAL CO., MONSANTO CO., AMERICAN HOME PRODUCTS, INC., HERCULES INCORPORATED, OCCIDENTAL CHEMICAL CORPORATION, ULTRAMAR DIAMOND, CHEMICAL LAND HOLDINGS, INC., MAXUS ENERGY CORP., HARCROS CHEMICAL INC., SHAMROCK CORP., AND DOES 1-100, THOMPSON HAYWARD CHEMICAL CO., T-H AGRICULTURE & NUTRITION CO., INC., UNIROYAL, INC. and C.D.U. HOLDING, INC., UNIROYAL CHEMICAL Co.,
Defendants-Appellees.

00-7455
[FILED: May 8, 2002]

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellee Dow Chemical Co.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk

By: /s/ Arthur M. Heller
Arthur M. Heller,
Administrative Attorney

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Michael F. Ryan, et al., Plaintiffs
-against-
Dow Chemical Company, et al., Defendants.

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79 CV 747 (JBW)

IN RE:
"Agent Orange" Product Liability Litigation

MDL NO. 381

Joe Isaacson and Phillis Lisa Isaacson, Plaintiffs
-against-
Dow Chemical Company, et al., Defendants.

Civ. No. 98-6383 (JBW)

Daniel Raymond Stephenson, et al., Plaintiffs
-against-
Dow Chemical Company, et al., Defendants

Civ. No. 99-3056 (JBW)

ORDER AND JUDGMENT

The Court heard argument on defendants' motion to dismiss in the above-captioned actions on December 13, 1999. A copy of the transcript of proceedings is attached

hereto. Upon consideration of that argument and all pleadings, motions, proceedings, and the full record in MDL-381 and in the above-captioned actions, it is hereby **ORDERED** that defendants' motion to dismiss is **GRANTED**; and **IT IS FURTHER ORDERED** that the complaints and any and all amendments thereto filed in *Isaacson v. Dow Chemical Company, et al.*, Civ. No. 98-6383 (JBW) and *Stephenson v. Dow Chemical Company, et al.*, Civ. No. 99-3056 (JBW), shall be dismissed as against all defendants with prejudice and without costs assessed to any party.

Dated: April 7, 2000

/s/ [STAMP]
Hon. Jack B. Weinstein

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Daniel Raymond Stephenson, Plaintiff,

versus

Dow Chemical Company, et al., Defendants

Civ. No. 99-3056 (JBW)
[ENTERED: April 3, 2000]

ORDER AND JUDGMENT

The Court heard argument on defendants' motion to dismiss in the above-captioned matter on December 13, 1999. A copy of the transcript of proceedings is available. Upon consideration of that argument and all pleadings, motions, proceedings, it is hereby **ORDERED** that defendants' motion to dismiss is **granted**; and

IT IS FURTHER ORDERED that the complaint and any and all amendments thereto filed in *Stephenson v. Dow Chemical Company, et al.*, Civ. No. 99-3056 (JBW), shall be dismissed as against all defendants with prejudice and without costs assessed to any party.

Signed this 27th day of March, 2000.

/s/ [STAMP]
Honorable Jack B. Weinstein

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Joe Isaacson, Daniel Stephenson, Plaintiffs

v.

Dow Chemical Co., et al., Defendants

CV 98-6380

CV99-3065

United States Courthouse
Brooklyn, New York

December 13, 1999
10:15 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS BEFORE
THE HONORABLE JACK B. WEINSTEIN
UNITED STATES DISTRICT JUDGE

* * * *

(In chambers.)

MR. SMOGER: I am Gerson Smoger, on behalf of plaintiff Joe Isaacson. Joe Isaacson is here.

If it's okay with your Honor, the national director of the Vietnam Veterans of America, George Claxton, is sitting there. There is the vice director, vice chair of the Vietnam Veterans of America, Paul Sutton, and Bernie McElvay, the director of Vietnam Veterans of America from New Jersey.

Also here is Esther Barezofsky, my co-counsel in the Isaacson matter.

THE COURT: Would you open that door. This is a public hearing.

MR. MURRAY: Stephen Murray, Junior, for Dan Stephenson and his family.

MR. BROCK: Steven Brock for Dow Chemical Company.

MR. KROHLEY: William Krohley for Hercules.

MR. KALISH: Myron Kalish for Uniroyal.

MR. SABETTA: John Sabetta for Monsanto Company.

MR. D'ALOISE: Lawrence T. D'Aloise, Junior for T. H. Agriculture and Nutrition Co.

MR. GORDON: Michael Gordon for Occidental Chemical Corporation, as successor to Diamond Shamrock Chemical Companies.

THE COURT: Sorry we have to have this in chambers. I hope you're all comfortable. The courtroom is being used because of an overflow in connection with a sentencing this morning.

I'll be happy to hear everybody.

MR. BROCK: It is our motion to dismiss both as to the Isaacson and Stephenson cases.

As you know, based on the two prior decisions of the Court of Appeals addressing very much the same issues, the motion involves res judicata. Plaintiffs concede that res judicata generally applies even if the prior decisions were wrong or if there had been a change of law, matters we don't think apply here.

But given the circumstances -- the court is familiar with the case, I'm not going to go through all that in detail -- that we have had two complete reviews of very much the same issues, whether the class actions are entitled to res judicata, by the Supreme Court, the matters that they raise suggesting

that there is some difference here with the fact that the veterans payment program under the prior Agent Orange settlement ended in 1995; that is a matter that has been known, based on your Honor's decision, back when the last two decisions of the Courts of Appeals affirmed that the class bound future claimants -- it is not something that is new.

The Second Circuit, in the Addington case, one of the cases involving challenges to specific payments under the settlement distribution plan, said that it was too late to challenge the distribution plan at this point.

Other factors that would indicate that that can't be taken into consideration are the fact that the plan was not agreed to by the class representatives. That distinguishes this from a lot of other cases in which the class representatives negotiated a particular settlement agreement and allocation, perhaps, between future and current claimants.

In this case, the settlement was agreed upon without any such allocation, and this court determined the allocation method, which was affirmed on appeal. Under those circumstances there is not any suggestion that differences in representation would have affected or would apply in the same way that they might when the class representatives actually negotiated allocations of funds between different categories of plaintiffs.

Plaintiffs also ignore the fact that the class assistance program provided lasting benefits for all the class members and suggest simply because if they didn't have an opportunity to apply for individual payments under the veterans payment program that they got nothing.

I think the court envisioned that all the claims at issue, both current and future, were essentially without merit because of the difficulties with causation and with the strength of the government contract advance. So there is no real variation in interest, in actual interest with any conflict in this case that those subclasses are not required. I think that continues to be the law of the case.

The cases all look to an actual conflict of interest on the facts. There might often be, as this court has considered in the past, conflicts between future and current claimants, but in this particular case there were not. So the court's decision remains solid.

In the Isaacson case, they suggest that non-Hodgkin's lymphoma deserves special consideration and deserves special payment. Those sorts of issues, again, were considered in the last two cases. They have already been addressed. The court has considered the causation evidence, and also considered the possibility that the scientific studies might change in the future, when it reached its prior decisions.

The ten million dollar reserve that was released on the court's motion, which would have protected defendants at least against the Isaacson claim if it were still in existence, that was premised on the finality of the Ivy-Hartman case. It was lifted based on the understanding that preclusion would apply to future claimants under that decision and that an injunction would prevent litigation and relitigation and any further judgments, therefore the reserve was no longer necessary.

I think at this point, having let go the reserve, there is significant due process interests of the defendants in the balance of being subject to double liability in a situation such as this.

The law of collateral attack, which plaintiffs apparently assert gives them an unlimited right to litigate one by one with all the remaining outstanding class members, is not so open-ended.

We have addressed in our papers a number of the cases that indicate various appropriate limits on it, including the most recent case of the Ninth Circuit in Epstein, interpreting the Supreme Court's decision in Matsushita, which suggests that the main assurance of fairness of adequate representation should be in the initial court and on direct review of that decision, and that a collateral review should be limited just to

determine that in fact the initial court did consider the issue and did not overlook it. Under that standard, the plaintiffs have already had far more due process than the minimum they would be required.

We have identified a number of other law and policy authority which would support limiting collateral attack in a number of ways. Rather than go into them all here, I would simply direct your Honor to one distinguishing factor in this case, which is the extension of an injunction barring future suits.

There is not any question under the Supreme Court authorities that there is no collateral attack on an injunction. An injunction has nationwide scope. It has to be challenged in the court that issued it. It may not be collaterally attacked even if the injunction is unconstitutional, as the plaintiffs allege here.

In those circumstances, this court has ample additional authority specific to the particular circumstances of this case to direct and consider and not allow any attacks -- further collateral attacks, I should say -- given that there have already been one full litigation and a full collateral attack on exactly these issues that have been raised here.

Absent any further questions of the court, and subject to what response I might have to what plaintiffs say, I believe the case is properly dismissed at this point.

THE COURT: Does any other defendant wish to address the court?

All right, I will hear from plaintiffs.

MR. SMOGER: I will start with the idea of whether we can be here at all in terms of a collateral attack. The cases cited by the defendants jointly on the collateral attack issue were all Delaware cases and operated under Delaware state law. They all had personal jurisdiction, but it was found that the stock ownership were Delaware corporations and people owned stock in Delaware.

Delaware state law is peculiar because it doesn't allow for collateral attack, but collateral attack is clearly the law of the federal courts and the law of almost every other state court.

So they have interpreted Delaware law, and even then they carved out a narrow exception in full faith and credit to Delaware law where they said we can't look at the substantive due process or the substance of the decision, but we're still going to look at the procedure.

I think that is peculiar. In fact, Release Oil, which was a Texas case, specifically says that we're dealing with Alabama law, and since Alabama law looks at collateral attack, we will look at collateral attack.

So that gets to whether you can look at this at all, and I think the defendants in their brief, I think they correctly -- this is a quote from their brief. It says, res judicata can only proceed under narrow exceptions -- this is the reply brief -- such as the lack of due process in the prior ruling, which is to be found on page 13 of the defendants' reply brief.

That is correct. So that I think we get to the core question here, the core question whether the prior rulings and the prior holding, as it stands now -- and this is a different case than before -- as we stand here today, is due process met?

We have some benefits that didn't exist before. We have the Supreme Court's pronouncements in both Amchem and Ortiz. In looking at them, one of the things about those settlements is here we're dealing with the ten year --

THE COURT: Those were on direct appeal --

MR. SMOGER: Yes.

THE COURT: -- not collateral.

MR. SMOGER: Absolutely. They were not collateral. But Hornsbury versus Lee was a collateral attack, and that was incorporated in the 1966 amendments, and the vast majority of attacks in the federal courts on class actions have been collateral attacks.

I understand that Amchem itself -- and I'm not using it to say that Amchem itself says anything about a collateral attack, what it does talk about is the requirement of adequate representation.

I'm moving over to the adequate representation issues because I think that if we can have a collateral attack then we are talking about the due process issues, and two issues come up. One is adequate representation and the other one is notice.

I want to deal with notice briefly, first. It's peculiar because I think notice is the one thing that was clearly discussed both by your Honor previously and by the Second Circuit. However, in both of the decisions there was -- and it's almost to the line -- the Second Circuit said that when you look at notice itself, you have to look at the overriding needs of the class above the individual needs.

The Supreme Court actually cited the Agent Orange cases, saying we don't look at that, that that is a fairness issue, but that's not a predicate issue for the class, and the predicate issue is, is due process met?

They said it's wonderful -- I mean, that was Breyer's dissent, that we really need a legislative solution, but the Supreme Court said we can't look to a legislative solution, we have to look at the fact is due process met for the individual. And the reason I bring up notice is the Supreme Court, I think, has said that individual notice is required, if it can be done.

We think that there was a good chance that Joe Isaacson could have gotten individual notice. I understand that your Honor said it was very difficult with the military as it stood at that time to give generalized notice, but there are some military people that could have gotten individual notice, but he wasn't on the registry.

So we think that that is an issue, though I'm not going to say that it wasn't addressed by your Honor and the Second Circuit.

What was not addressed, and I think the defendants miss -- I don't think they understand the thrust of our brief is that we think that there was a subclass of post 1994/1995 individuals that was separate and apart from the individuals that were addressed by Ryan and Ivy.

It was well stated, both by your Honor and the Second Circuit, that Ivy and Ryan stood in the exact same shoes as anybody that had a contemporary injury. That, however, is not true of Joe Isaacson because anybody that suffers the exact same injury or has --

THE COURT: You don't mean injury, you mean awareness of injury. Injury occurs at the time of the spraying, the awareness occurs later.

So you're relying upon awareness?

MR. SMOGER: I'm relying on the discovery rule, yes. And if the discovery rule is in 1996, I mean, obviously, Mr. Isaacson did not have non-Hodgkin's lymphoma until 1996, so he had no ability to be a participant in the pre-1994 settlement.

So by the terms of the settlement when it was established, anybody that had the exact same injury, or would have been entitled to compensation before 1994, is not entitled to compensation when the funds run out, which we think is a separate subclass.

Even in Amchem they had a ten-year period for the settlement, with a re-upping of the settlement subject to the defendants after it closed at ten years, with a joint recognition of whether you wanted to go into the future.

In this case the funds are gone and the defendants are saying, well, the funds are gone. There is no re-upping it's gone, and there's no entitlement to any funds at all.

We think that Mr. Isaacson has an injury. He's entitled to a personal, individual remedy for that injury and the remedy is gone; therefore, he should be allowed to proceed.

THE COURT: Does the other plaintiff's representative wish to be heard?

MR. MURRAY: I would join in the remarks of Mr. Smoger and just also point out that the conflict that is at the heart of Amchem exists every bit as much in this case as it did in Amchem, which is that with regard to post 1994 injuries there's a conflict as to compensation versus utter lack of compensation, and nothing that came later in Ortiz, in the reply brief that Mr. Brock --

THE COURT: I don't understand your point. Were people compensated who found out about their injury post judgment in this case?

MR. MURRAY: Your Honor, my point is that --

THE COURT: Isn't that so?

MR. MURRAY: Yes, there were. But they were at least participants in the fund. I would submit that under Amchem they would -- people who had a post 1984 post settlement injury would likewise have had a conflict, but this court and the Second Circuit felt that that conflict was de minimus because the people were equally treated under the settlement.

THE COURT: I really don't understand your point at the moment, your factual point. I don't say that critically.

People were compensated who found out about their injury post 1994, correct?

MR. MURRAY: In the instant case?

THE COURT: Yes.

MR. MURRAY: I don't believe so, your Honor.

THE COURT: You don't believe so?

MR. SMOGER: Post 1984. I think you said post 1994.

THE COURT: '84, post '84, yes.

MR. MURRAY: Correct.

THE COURT: Post judgment.

MR. MURRAY: Yes.

THE COURT: People who found out about their injuries later were compensated.

MR. MURRAY: However, there's a conflict between anyone who found out about their injury post 1994 versus someone who found out about their injury pre-1994.

THE COURT: What is the 1994 cut-off? What is the significance of that?

MR. MURRAY: Those persons are not entitled to any compensation under the settlement whatsoever.

THE COURT: Because?

MR. MURRAY: Because the settlement fund has been exhausted and has reverted back to the -- under the plan the ten million dollars is reverted out of the settlement.

THE COURT: Reverted back to whom?

MR. MURRAY: I believe that your Honor reverted -- allocated the ten million dollars in funds to veterans' benefits program.

THE COURT: That's right. All the funds have been expended except for some three hundred thousand dollars, which will go to the veterans legal organization. All the residual amount will be expended on behalf of the veterans and their families.

I don't understand what your point is from a legal standpoint. There are no funds at the moment except for the residual amount of about three hundred thousand, as I understand it, which will go to the veterans group.

Would you ask my secretary to give you a copy -- get a half dozen copies of the final report and that orange legal document that goes to all veterans who apply now.

I want to get your factual contentions straight because I don't quite understand it. Are you contending now that your client found out about his injury after all the money had been expended that was available, is that your point?

MR. MURRAY: Yes, your Honor.

THE COURT: Okay.

MR. MURRAY: And there would be a conflict between someone such as my client and a class representative who either found out -- who knew of his injury at the time of the settlement, under Amchem.

THE COURT: At the time of the settlement or post settlement when there were funds being expended?

MR. MURRAY: Your Honor, there --

THE COURT: There were thousands and thousands of cases of people who found out later and were compensated for their own injuries -- pass those out -- this is the final report. Have you seen the final report --

MR. MURRAY: No, your Honor.

THE COURT: -- in this case?

MR. BROCK: It was attached --

THE COURT: Mark it as a document and give it to counsel so they understand what the factual predicate is.

Do you representatives of the veterans organizations want to see this report? Have you seen it? Give out those copies and give out those orange reports which explain to the veterans what their present rights are for compensation.

A great deal of the money was given to the legal organizations, which, on behalf of the veterans, acted to get necessary legislation and Veterans Administration rulings to take care of just exactly the situation you're raising -- that is for people who are now suffering injuries which the government has recognized it is its primary duty to compensate.

Where are those orange pamphlets?

(Pause.)

THE COURT: So I'm not quite clear that I understand your position, your posture. I'm trying to state it for the record.

Is it your posture that those who can no longer be compensated by court funds, because effectively the time to apply

for court funds has expired, were not represented adequately in the original hearings?

MR. MURRAY: Correct, your Honor.

THE COURT: And for that reason they were denied due process?

MR. MURRAY: Yes, your Honor.

THE COURT: Okay. Is that your position, too?

MR. SMOGER: Basically.

THE COURT: What is the difference? I want to get it exactly.

MR. SMOGER: The position is that those people -- that there's a separate subclass established at the very outset for post -- people that got injury before 1994 and people who had injury after 1994.

I think your Honor phrased it in the sense of whether they could apply. Certainly, if somebody could fit in within the class of 1993 but hadn't applied until 1996, then there is the argument that that is consistent with the rulings in Ryan and consistent in Ivy.

The question is, since they had no ability to apply before --

THE COURT: Because they didn't know?

MR. SMOGER: Because they hadn't been diagnosed --

THE COURT: I don't see the difference between your point and co-counsel's point.

MR. SMOGER: Then the subsequent point that we think Amchem requires is that that subclass be given separate representation, and that's the hallmark ruling of both Amchem and Ortiz, because they are treated differently by the settlement iself than those people who could have applied before 1994.

THE COURT: I'm not going to debate those cases. I have given a lot of study to those cases and they don't hold.

I think, what you say they do. But assuming they do, I don't think you make out any case, respectfully.

There was a very full set of hearings throughout the nation to determine the fairness of the Agent Orange settlement. I remind you that at the time of that settlement the epidemiological evidence did not support any finding for the veterans. There was no proof available indicating, to the degree required in a court proceeding -- I'm not talking about an administrative proceeding, or what Congress says, or what anybody else says about the probabilities of causation -- at that time there was no proof that there was sufficient epidemiological, animal study, or any other evidence, including continuing studies of the veterans themselves and of their children -- I won't rehearse the many studies, they are all on file in this court -- that would permit the case to go forward, and the case would have had to be dismissed, with the veterans getting nothing at all, based upon the law then in effect, and the law still in effect, with respect to probabilities and the necessity of proof.

Had there been no settlement, there would have been no recovery for the veterans. The proposed recovery was thoroughly rehearsed in hearings at which all veterans and their organizations were invited to and did attend.

After those hearings, the court held discussions with all attorneys and anyone else who wished to be heard, those who knew they were sick, those who thought they might be sick in the future, those who thought that they might not have children because they were affected, or their children might be affected, and the like.

The court then approved the settlement. It was appealed to the Court of Appeals, which approved the settlement. That is the final decision. Whether right or wrong at that time, that is the end of the case.

A collateral attack of this kind, based upon the law, as I understand it, which is still very unclear, is not permissible. There is nothing in your papers -- and I don't say this with

any criticism -- obviously, you have done a very fine job on behalf of your clients -- that suggests that any of the decisions made originally were invalid or inappropriate.

The decisions that have been made by Congress were made upon probabilities that are not recognized by the courts in a case of this kind.

So nothing has changed. There is no reason to reopen these cases on the merits. There is no reason to reopen them as a matter of law.

Congress has stepped in and taken legislative control of the matter. You see that discussed in those orange pamphlets, which indicate what the rights of the veterans and their families are. So even now, and for a considerable time in the future, because of the legal representation given to those who claim they are suffering from Agent Orange -- and I have a great deal of sympathy, obviously, for them, as a veteran myself -- still have access to some of those funds indirectly.

I'm not going to reopen this case at this point. There has to be some final settlement and some calling to an end of litigation. This litigation has gone on for an awfully long time, and that is particularly true in this case because Congress has stepped in and taken control.

There is no legal basis that I know of at this point in this case to set aside those original agreements. If you could move always to set aside these things, you'd never get any settlement in these cases, defendants would never put any money into these cases.

You have to attack directly, not by a collateral attack some fifteen years after judgment. I just don't see it. I've read your papers. I don't see that there is any basis for this attack.

I won't charge you with any costs and disbursements, obviously, since there are veterans and veterans' organizations involved. You can take an appeal if you wish. I'm not going to write another opinion. You can agree to an order --

I think you can -- just a simple order of dismissal for reasons stated orally on the record.

Do you want to say anything further?

MR. SMOGER: I wanted to just say that I think that that was the argument of the future. I think there is a desire for finality, but I think it was recognized in Ortiz and in Amchem, even when they came to the settlement, that there couldn't be finality and in most of the settlements now there is back-end opt outs.

THE COURT: This is fifteen years after the event. Class actions have come a long way. This was settled. It was the first major settlement where now some three hundred million dollars have been expended on behalf of the veterans and their families, and now to come back fifteen years after the event and say if this case were pending now it might be handled differently doesn't strike me as very persuasive.

In addition to which, I suggest to you that even if it were started today, there would be no recovery whatsoever in these cases based on Daubert and the Supreme Court's very clear findings with respect to what kind of scientific proof that is required.

Your clients, I think, should be told -- I don't criticize you again -- that the standards before a court are different from the standards before Congress and before administrative agencies.

You have submitted no proof whatsoever that a preponderance of the evidence can be adduced with respect to any of these injuries to the veterans or to their children. I remind you, too, that the first children and families who were ever compensated in connection with these matters was because of the funds that were expended by this court, which ultimately led to the spina bifida rulings. That was a major change and also a help to the families.

June, get a set of those reports that we made to the nation as a whole, the bound volumes on the shelf.

The Agent Orange funds were used to train people all over the country on how these matters should be handled. Every veteran, including the Gulf War veterans, benefited from these funds.

MR. SMOGER: Your Honor, the --

THE COURT: I took the very broadest view in order to give the veterans and their families the maximum protection. I don't really see that there is any fundamental basis for re-opening. These are just one of the things that we did to train people -- this is a 1994 national symposium -- relied on all over the world on how veterans and their families should be treated.

Hand them out to whoever got the other.

The Veteran's Administration and Congress people themselves attended, and that's one of the reasons why you got all this legislation.

MR. SMOGER: Your Honor, I might be here in two different places. I was the attorney for Admiral Zimwald, so I know these materials. But right now I'm only here on behalf of Joe Isaacson.

When we talk about the future, and we talk about the specifics, I recognize that some of the conditions at the Veteran's Administration have a lower standard, however, as to certain things -- and the reason we're here particularly on Joe Isaacson is the non-Hodgkin's lymphoma. The literature is very strong in terms of that, and I think we would survive a Daubert challenge.

THE COURT: That is possible. I tried to keep current with all the scientific studies, including those proffered by Admiral Zimwald, whom I greatly respect -- hand those out to those people who got the other material -- but I don't think that it affects this case.

MR. SMOGER: I think the point of what the Supreme Court was saying is as to the future, and the point for Mr. Isaacson is Mr. Isaacson would never have brought a suit,

had no reason to bring a suit, and I know that your Honor did the best he could, that could possibly be done at the time --

THE COURT: That is not true. Excuse me. What you just said is not true. In the asbestos cases, the asbestos future claimants were protected in the class actions, the bankruptcy action, the Johns-Manville action, even though they didn't know what their diseases might be.

It may be that the original suit could have been handled differently, but at this stage it seems to me there is no basis for reopening.

Hasn't your client applied for federal funds?

MR. SMOGER: Yes.

THE COURT: Is he getting Veteran's Administration --

MR. SMOGER: He's getting funds from the government that the government should be entitled to recover from these defendants, and the government would be subject to a lien. Just as asbestos claimants, when they get Medicare, the entire amount has to be reimbursed to the government by statute. We think it should be no different here.

THE COURT: Well, that may well be. The government will have to prosecute that if they think they have a cause of action. I am cognizant of the very fine way you've handled the case, but I'm not going to permit it to go on in this court, so submit a judgment. Try to agree on the terms. If you can't within forty-eight hours, submit contrary judgments and take it up on appeal. If I am wrong, the Court of Appeals will rectify that, or the Supreme Court will. I am perfectly willing to learn. Anybody else wish to be heard?

MR. SMOGER: Thank you for your time, your Honor.

THE COURT: It is my pleasure always to see you.

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APPENDIX F

United States District Court,
E.D. New York.

In re "AGENT ORANGE" PRODUCT LIABILITY LITIGATION.

MDL No. 381.

Dec. 16, 1983.

[100 F.R.D. 718]

MEMORANDUM AND PRETRIAL ORDER

WEINSTEIN, Chief Judge:

Plaintiffs, Vietnam War veterans and members of their families, claim to have suffered damages as a result of the veterans' exposure to herbicides in Vietnam. Defendants allegedly produced these herbicides.

Some years ago this court ruled that the litigation would proceed as a class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. *In re Agent Orange Product Liability Litigation*, 506 F.Supp. 762, 787 ff. (E.D.N.Y.1980). No certification order was, however, entered. The court noted that later stages of this litigation, especially those concerned with individual causation and damages, "may require reconsideration" of the certification. *Id.* at 790. Those later stages have now been reached.

The questions to be decided are whether the class should be certified, which of the types of classes described by Rule 23 should be utilized, how the class should be described, and for what issues. For the reasons indicated below, the class is certified for all issues under 23(b)(3), and on the issue of punitive damages under 23(b)(1)(B). This certification requires

a number of decisions on the mechanics of notice described in the following discussion.

INTRODUCTION

Plaintiffs have increasingly sought to use class actions to redress injuries caused by a single product manufactured for widespread use. A number of courts have seen the class action as the only alternative "to trying ... virtually identical lawsuits, one-by-one," resulting in the "bankruptcy of both the state and federal court systems." Williams, Mass Tort Class Actions, 98 F.R.D. 323, 324 (1983). Three factors in the instant litigation make the desirability of class certification even greater than it would be in most mass tort litigation.

The first is size. The potential size of plaintiffs' class in this litigation numbers in the tens of thousands. If the claims are dealt with individually, the result might "result in a tedium of repetition lasting well into the next century." *In re No. Dist. of Cal. "Dalkon Shield" IUD Product Liability Litigation*, 526 F.Supp. 887 (N.D.Cal.), *rev'd*, 693 F.2d 847 (9th Cir. 1982), *cert. denied sub nom. A.H. Robins v. Abed*, -- - U.S. ----, 103 S. Ct. 817, 74 L.Ed.2d 1015 (1983). By way of contrast, there were only several hundred plaintiffs in the class certified by the district court in *In re Federal Skywalk Cases*, 93 F.R.D. 415 (W.D.Mo.), *vacated*, 680 F.2d 1175 (8th Cir. 1982), *cert. denied sub nom. Johnson v. Stover*, 459 U.S. 988, 103 S.Ct. 342, 74 L.Ed.2d 383 (1983)and less than 4,000 in the *"Dalkon Shield"* litigation.

Second is the need to assure that the financial burden will ultimately fall on the party which, it may be found, should as a [721] matter of fairness bear it. As this court pointed out:

> Overarching the entire dispute is a feeling on both sides that whatever existing law and procedures may technically require, fairness, justice and equity in this unprecedented controversy demand that the government assume responsibility for the harm

> caused our soldiers and their families by its use of Agent Orange in Southeast Asia.

In re Agent Orange Product Liability Litigation, 506 F.Supp. 762, 784 (E.D.N.Y. 1980). A class action is the best vehicle for achieving that end. A single class-wide determination on the issue of causation will focus the attention of Congress, the Executive branch and the Veterans Administration on their responsibility, if any, in this case. By contrast, possibly conflicting determinations made over many years by different juries make it less likely that appropriate authorities and the parties will arrive at a fair allocation of the financial burden, if any.

Third, certification may encourage settlement of the litigation. In a situation where there are potentially tens of thousands of plaintiffs, the defendants may naturally be reluctant to settle with individual claimants on a piecemeal basis.

LAW

Rule 23(a) contains four prerequisites to the maintenance of a class action. They are:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims ... of the representative parties are typical of the claims of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

The four prerequisites as they applied to this litigation have already been carefully analyzed by the court and found to exist. *See In re "Agent Orange" Product Liability Litigation*, 506 F.Supp. 762, 787 (E.D.N.Y. 1980). Present as well as prior counsel for plaintiffs appear adequate to their complex task. The only matter on which further elaboration is needed is the second prerequisite, the requirement that there be "questions of law or fact common to the class." Discussion of this point will be combined with a discussion of Rule 23(b)(3).

Rule 23(b)(3)

Rule 23(b)(3) states that if the four prerequisites of 23(a) are met, the class will be certified if, in addition, the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Thus, the issues to be decided are (1) do questions of law or fact common to the class predominate over any questions affecting only individual members, and (2) is a class action the best method for resolution of the litigation.

This court's prior finding that the government contract defense and the affirmative defense of misuse are common to the class is not contested by the parties. Defendants strongly contend, however, that the heart of any product liability claim, causation, can never be common to the class since each veteran, spouse and offspring who has instituted a lawsuit claiming direct or derivative injuries from the veteran's exposure to Agent Orange brings to this case a unique history upon which his or her claim for damages is predicated. Each veteran was exposed, if at all, at different times, at different places and under different circumstances. Therefore, the argument continues, a determination on the issue of causation, whether made as a finding of general causation or as a result of a finding in "test" cases, can never be dispositive of the claims of the other class members and as a result common questions do not "predominate."

Defendants support their argument by citing the Advisory Committee's Notes on Rule 23 and a number of recent cases that have denied (b)(3) certification in mass tort cases. *See, e.g., In re No. [722] Dist. of Cal. "Dalkon Shield" IUD Product Liability Litigation,* 693 F.2d 847 (9th Cir. 1982), *cert. denied sub nom. A.H. Robins v. Abed,* --- U.S. ----, 103 S.Ct. 817, 74 L.Ed.2d 1015 (1983); *Payton v. Abbott Labs*, 100 F.R.D. 336 (D. Mass. 1983) (DES Claims); *Boring v. Medusa Portland Cement Co.*, 63 F.R.D. 78 (M.D.Pa. 1974) (county residents seeking damages for air pollution); *Yandle v. PPG Industries, Inc.*, 65 F.R.D. 566 (E.D. Tex. 1974) (employees of asbestos plant).

Without setting forth the details and analysis of each case, it is fair to say that the reasoning of all of the cases they rely upon is the same as that of the Advisory Committee and is supportive of defendants' reasoning. The drafters' notes state:

> A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class certification because of the likelihood that significant questions not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action nominally conducted as a class action would degenerate in practice into multiple lawsuits separately tried.

Advisory Committee Notes to Proposed Rules of Civil Procedure, 39 F.R.D. 69, 103 (1966). The defendants insist that the Agent Orange situation is even worse in that the focus of the litigation is not a "mass accident," but a mass products liability based upon a series of discrete events.

Following defendants' analysis, the District Court in Texas, in denying certification of a (b)(3) class consisting of all former employees and survivors of former employees of the defendant's asbestos plant, stated that the litigation is very different from the single mass accident cases that have in the past allowed a class action to proceed on the liability issues. Those cases have normally involved a single tragic happening which caused physical harm or property damage to a group of people, and affirmative defenses are absent. Usually, one set of operative facts will establish liability ... The Court is in agreement with the defendant that there is not a single act of negligence or proximate cause which would apply to each potential class member and each defendant in this case.

Yandle v. PPG Indusries, Inc., 65 F.R.D. 566, 571 (E.D. Tex. 1974). Similarly, the District Court of New Hampshire denied (b)(3) certification to a class consisting of all New Hampshire women claiming injury from DES. Plaintiffs sought a blanket determination that DES causes injury *in utero*. The court stated that "such a determination [would] do nothing to advance the cause of class members as a group." *Mertens v. Abbott Laboratories*, 99 F.R.D. 38 at 41 (D.N.H. 1983). If the class is certified, defendants suggest that the certification and class trial should be limited to the only issue which they see as common to the entire class, that is, the government contract defense.

The force of the defense contention is substantial since commonality is critical to certification. Nevertheless, it is not conclusive. In deciding whether common questions predominate, a pragmatic evaluation of the interest of the class members is given great weight. As Professors Wright and Miller put it:

> In general, a Rule 23(b)(3) action is appropriate whenever the actual interests of the parties can be served best by a single action.... [T]he proper standard under Rule 23(b)(3) is a pragmatic one, which is in keeping with the basic objectives of the Rule 23(b)(3) class action. Thus, when common questions represent a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is a clear justification for handling the dispute on a representative rather than on an individual basis."
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> 7A C. Wright & A. Miller, Federal Practice and Procedure § § 1777, 1778 (1972). *See also id.* at § 1783; Wright & Colussi, The Successful Use of the Class Action Device in the Management of the *Skywalk* Mass Tort Litigation,-- Univ. of Missouri-Kansas City L.Rev.--(1984) (forthcoming) (noting [723] the successful use of a 23(b)(3) class in the *Skywalk* litigation); Note, Federal Mass Tort Class Action: A Step Toward Equity and Efficiency, 47 Albany L.Rev. 1180 (1983). Litigation economies are also relevant. One commentator has gone so far as to suggest that "the chief purpose of the predomination inquiry is not to measure the compatibility of class action procedures with substantive law but to determine whether a class action will in fact realize any litigation economies." Note, Developments in the Law--Class Actions, 89 Harv.L.Rev. 1318, 1505 (1976).

Unlike litigations such as those involving DES, Dalkon Shield and asbestos, the trial is likely to emphasize critical common defenses applicable to the plaintiffs' class as a whole. They will include such matters as that the substances manufactured could not have caused the injuries claimed; that if any injuries were caused by defendants' product it was because of the particular use and misuse made by the government; and that the government, not the manufacturers were wholly responsible because the former knew of all possible dangers and assumed full responsibility for any damage. No "defenses to liability [are] present affecting the individuals in different ways." *Advisory Committee Notes*, 39 F.R.D. at 103. It is anticipated that a very substantial portion of a prospective four-month trial will be devoted to just those defenses. Certification would be justified if only to prevent relitigating those defenses over and over again in individual cases.

Defendants' proposal to limit the class trial to the issue of the government contract defense is not a workable one. As this court has already noted, the issue of the government contract defense is inextricably interwoven with the issue of causation. *In re Agent Orange Product Liability Litigation*, 565 F.Supp. 1263, 1275-76 (E.D.N.Y. 1983). It would be impossible to try the former without litigating and reaching conclusions as to the latter.

Even more persuasive is the extraordinary size of plaintiffs' class and the posture of the dispute. Unlike a case such as *Mertens* or *"Dalkon Shield"*, a determination on the issue of causation would do much to resolve the individual claims of the class members. The plaintiffs have indicated that there

are a number of types of injuries which Agent Orange allegedly caused. The court has, therefore, ordered that, for purposes of the causation issue, plaintiffs' counsel will choose representative claimants for each type of injury alleged. A determination adverse to the plaintiffs in all categories could resolve the litigation and save considerable judicial and lawyers' time. Even if there is a finding of no causation as to less than all of the types of damage alleged, that determination alone would be likely to resolve tens of thousands of individual claims. *Cf. In re Antibiotic Antitrust Actions,* 333 F.Supp. 278, 281, *modified,* 333 F.Supp. 291; 333 F.Supp. 299 (S.D.N.Y. 1971).

Were there a finding of causation favorable to the plaintiffs across the board, that, too, will help resolve the individual claims of the class members. Unlike the asbestos, *DES, Dalkon Shield,* and *Federal Skywalk* cases, defendants contest liability not just as to individual members of the class, but as to any members of the class. Thus, unlike other mass product liability cases, a determination of general causation will serve both the interests of judicial economy and assist in the speedy and less expensive resolution of individual class member's claims. *Cf. Thompson v. Proctor & Gamble Co.,* No. C-80-3711 EFL (N.D.Cal. December 7, 1982), slip op. at 4; *Mertens v. Abbott Laboratories,* at 42-43. *See also* Note, Class Actions in a Products Liability Context--The Predomination Requirement and Cause-In-Fact, 7 Hofstra L.Rev. 859 (1979).

Finally, the court may not ignore the real world of dispute resolution. As already noted, a classwide finding of causation may serve to resolve the claims of individual members, in a way that determinations in individual cases would not, by enhancing the possibility of settlement among the parties and with the federal government.

The considerations already described make it clear why effective case management [724] would not be possible were the court to pursue the alternative of allowing individual

plaintiffs to intervene in a single case. A verdict in such a case either as to the affirmative defenses or causation might not be binding on the tens of thousands of plaintiffs not parties to the suit. A class action is, therefore, "superior to other available methods for the fair and efficient adjudication of the controversy."

Defendants further object that even if the litigation is otherwise suited for (b)(3) certification, the need to apply the law of dozens of different states would preclude certification or at least require different subclasses for each state. In most cases, this argument would have considerable force. As this court's opinions dealing with the choice-of-law problem in diversity cases and the law applicable to manufacturers' liability will show, it is of relatively little significance in this litigation. There is, as will be demonstrated, a consensus among the states with respect to the rules of conflicts and applicable substantive law that provides, in effect, a national substantive rule governing the main issues in this case. Since, in the main, one law applies to all the claims, certification of one class is appropriate. *Cf. In re No. Dist. Of Calif. "Dalkon Shield" IUD Product Liability Litigation,* 693 F.2d 847, 850 (9th Cir. 1982), *cert. denied sub nom. A.H. Robins v. Abed,* --- U.S. ----, 103 S.Ct. 817, 74 L.Ed.2d 1015 (1983).

Should there subsequently develop a need for creation of subclasses as the litigation develops and applicable substantive or procedural law requires application of individual states' laws, further subclasses can be created. *See, e.g., Halderman v. Pennhurst State School & Hospital,* 612 F.2d 84, 110 (3d Cir. 1979), *rev'd on other grounds,* 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981), *Kaufman v. Dreyfus Fund, Inc.,* 434 F.2d 727, 737 (3d Cir. 1970); *Eisen v. Carlisle & Jacquelin,* 391 F.2d 555, 566 (2d Cir. 1968); *In re Caesars Palace Securities Litigation,* 360, 398 360 F.Supp. (S.D.N.Y. 1973).

The last objection the defendants have to (b)(3) certification is that a class-wide trial on causation violates their right

to have a single jury rule on the question of the defendants' liability to each Agent Orange plaintiff. Issues may not be bifurcated for trial, they point out, unless it appears that the issues are "so distinct and separable" that they may be tried separately "without prejudice." *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500, 501, 51 S.Ct. 513, 515, 75 L.Ed. 1188 (1931); *Franchi Construction Co. v. Combined Ins. Co.*, 580 F.2d 1, 8 (1st Cir. 1978). If the issues are so interwoven that separate trials would cause confusion and uncertainty, a litigant is denied his right of fair trial. As applied to the *Agent Orange* litigation, defendants contend that advising a jury in a subsequent trial on "specific" causation that there has already been a "general" determination that Agent Orange could cause plaintiff's illness would unfairly prejudice the jury in plaintiff's favor. Defendants' argument is not persuasive. It is common in product liability suits for there to be a tacit admission that the defendant's product *could* have caused the injury alleged with the question for the jury being whether it actually did cause it. Juries often distinguish between general and specific causation.

In sum, the court finds (1) that the affirmative defenses and the question of general causation are common to the class, (2) that those questions predominate over any questions affecting individual members, and (3) given the enormous potential size of plaintiffs' case and the judicial economies that would result from a class trial, a class action is superior to all other methods for a "fair and efficient adjudication of the controversy."

Rule 23(b)(1)(A)

Certification is sought pursuant to Rule 23(b)(1)(A). The rule requires a risk of

> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class.

The court has already stated that "Rule 23(b0(1)(A) is not meant to apply ... where [725] the risk of inconsistent results in individual actions is merely the possibility that the defendants will prevail in some cases and not in others, thereby paying damages to some claimants and not others." 506 F.Supp. at 789 (citations omitted). If the risk of paying money damages to some and not others were sufficient for (b)(1)(A) certification, almost every class action could be certified under (b)(1)(A). *See McDonnell Douglas Corporation v. United States District Court, Central District of California,* 523 F.2d 1083, 1086 (9th Cir. 1975), *cert. denied sub nom. Flanagan v. McDonnell Douglas Corporation,* 425 U.S. 911, 96 S.Ct. 1506, 47 L.Ed.2d 761 (1976); *see also* A. Miller, An Overview of Federal Class Actions: Past, Present and Future 43 (1973).

Plaintiffs attempt to distinguish the current litigation by expressing concern that if different courts decide differently future contractors will not know the possible extent of their responsibility and whether they should bid on government defense or war contracts. Their concern is commendable, but misplaced. Any inconsistent or erroneous theories of law applied by trial courts in Agent Orange cases will certainly be rectified in the highest courts. It is unlikely that the Supreme Court would avoid clarifying the law on the subject. Rule 23(b)(1)(A) is not applicable.

Rule 23(b)(1)(B)

Plaintiffs also seek certification of a mandatory class under Rule 23(b)(1)(B). Under that section, when the four prerequisites of 23(a) are met, the class will be certified if, in addition, as a practical matter, individual adjudications would prevent or greatly impede the ability of other members to protect their interests. It reads in part:

> adjudications with respect to individual members of the class ... would as a practical matter be dispositive of the interests of the other members not parties

> to the adjudications or substantially impair or impede their ability to protect their interests ...

The rationale for using (b)(1)(B) in mass tort litigation is that of the "limited fund." As Professor Miller put the matter:

> The paradigm Rule 23(b)(1)(B) case is one in which there are multiple claimants to a limited fund ... and there is a risk that if litigants are allowed to proceed on an individual basis those who sue first will deplete the fund and leave nothing for latecomers.

A. Miller, An Overview of Federal Class Actions: Past, Present and Future 45 (1977).

As applied to mass tort litigation, the "limited fund" is generally construed to be the assets of the defendants as extended by insurance coverage and the assets of the insurers. The "fund" may also have a more limited bearing, as where the first judgments may take all of a limited punitive damage award. If earlier claimants proceed on an individual basis, it is urged, they will deplete the defendants' assets and leave nothing for later claimants. *See, e.g.,* Note, Mechanical and Constitutional Problems in the Certification of Mandatory Multistate Mass Tort Class Actions under Rule 23, 49 Brooklyn L. Rev. 517 (1983); Note, Class Actions for Punitive Damages, 81 Mich.L.Rev. 1787 (1983); Note, Class Certification in Mass Accident Cases Under Rule 23(b)(1), 96 Harv.L.Rev. 1143 (1981).

Before determining whether to certify the plaintiffs' class under (b)(1)(B), two threshold questions must be addressed. The first is whether (b)(1)(B) should ever be applied in mass tort litigation. The second, assuming that it should, is what standard to use in determining whether there is a risk that earlier litigants will deplete the fund and leave nothing for latecomers.

Although the matter is not free from doubt, most courts that have considered the issue have concluded that, in the proper circumstances, Rule (b)(1)(B) may be used in mass

tort cases. *See, e.g., Green v. Occidental Petroleum Corp.,* 541 F.2d 1335, 1340 n.9 (9th Cir. 1976); *Coburn v. 4-R Corp.,* 77 F.R.D. 43 (E.D.Ky. 1977), [726] *petition for mandamus denied sub nom. Union Light, Heat & Power Co. v. United States Dist. Court,*588 F.2d 543 (6th Cir. 1978), *cert. dismissed,* 443 U.S. 913, 99 S.Ct. 3103, 61 L.Ed.2d 877 (1979); *Hernandez v. Motor Vessel Skyward,* 61 F.R.D. 558 (S.D.Fla. 1973). *See also* Seltzer, Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control, 52 Fordham L.Rev. 37 (1983); Note, Federal Mass Tort Class Action: A Step Toward Equity and Efficiency, 47 Albany L.Rev. 1180 (1983).

Two recent circuit courts reversed after certifications of a Rule (b)(1)(B) class in mass tort litigation. *See "Dalkon Shield,"* 693 F.2d 847 (9th Cir. 1982), *Federal Skywalk Cases,* 680 F.2d 1175 (8th Cir. 1982). Both courts recognized the applicability of (b)(1)(B) certification in mass tort cases. In *"Dalkon Shield,"* the court stated that "[we] are not necessarily ruling out the class action tool as a means for expediting multi-party product liability actions in appropriate cases." 693 F.2d at 851. The court's decision was based largely on the fact that no plaintiff or defendant supported class certification. In *In re Federal Skywalk* cases, the court's decision was expressly based on the narrow grounds that the district court's certification violated the Anti-Injunction Act. 680 F.2d at 1183. Neither of these considerations apply here.

Courts that have considered the issue disagree over how to determine when the danger of fund exhaustion is great enough to justify certification. All conclude that "without more, numerous plaintiffs and a large ad damnum clause should not guarantee (b)(1)(B) certification." Payton v. Abbott Labs, 83 F.R.D. 382, 389 (D.Mass. 1979). The Ninth Circuit has held that (b)(1)(B) certification is proper only when "separate punitive damage claims *necessarily* will affect later claims." "*Dalkon Shield,*" 693 F.2d at 852. (emphasis supplied). Strict adherence to the Ninth Circuit cer-

tainty standard would mean either the elimination of (b)(1)(B) certification in mass tort actions (which is the position at least one court has taken (*see Payton, 83 F.R.D. 382, 389),* or require a pretrial determination on the merits, which the Supreme Court has frowned on in another class action context. *See Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177-78, 94 S.Ct. 2140, 2152-53, 40 L.Ed.2d 732 (1974)*; cf. Dolgow v. Anderson,* 438 F.2d 825(2d Cir. 1970) (no mini-trial on the merits). This strict Ninth Circuit standard flies in the face of the language of Rule 23, which requires only that there be a "risk" of impairment, not that there be a conclusive determination of impairment. *See* Note, Class Certification in Mass Accident Cases Under Rule 23(b)(1), 96 Harv.L.Rev. 1143, 1158 (1983).

In *Coburn*, 77 F.R.D. at 46, one of three unreversed mass tort cases where (b)(1)(B) certification was actually granted, the court did not articulate what standard it was using, stating merely that it found a "risk" of impairment. Given the speculative nature of many of the rulings that must be made at the time of a class certification when the facts have not been fully developed, such as typicality of representative claims and adequacy of representation, the probable risk standard appears most useful.

How high the probability needs to be requires an evaluation of the advantages and disadvantages of class certification to the actual and prospective parties. We must, for example, remember that the court is in the position of protecting a large group of war veterans against the possibility that after possibly winning a long-sought after victory in the courts, they will not be able to collect on a judgment in their favor. Without now rehearsing all those effects, it is enough to say that considering the particular facts of the instant litigation, the proper standard is whether there is substantial probability--that is less than a preponderance but more than a mere possibility--that if damages are awarded, the claims of earlier litigants would exhaust the defendants' assets. Considering the needs and problems of parties aligned both as plaintiffs

and defendants, the probability assessed at this time on the basis of limited information is somewhat less than 50 percent. The less-than-preponderance test is well recognized in procedural matters. *See, e.g.,*[727] *Rogers v. Missouri Pacific Railroad,* 352 U.S. 500, 509-10, 77 S.Ct. 443, 450, 1 L.Ed.2d 493 (burden of coming forward in F.E.L.A. cases); *Fitzgerald v. A.L. Burbank & Co.*, 451 F.2d 670, 681 (2d Cir. 1971) ("reasonable probability" of employer's negligence in F.E.L.A. cases); *Bush v. United States*, 389 F.2d 485 (5th Cir. 1968) (in forfeiture case "less than prima facie legal proof ... more than mere suspicion ... reasonable under all the circumstances"); *United States v. One 1975 Lincoln Continental*, 72 F.R.D. 535, 540 (S.D.N.Y. 1976) ("probable cause" in forfeiture case); Note, F.E.L.A., Negligence and Jury-Trials-Speculation Upon a Scintilla, 11 Wes.Res.L.Rev. 123, 136 (1959) (interpretation supported by the "spirit of the statute"). *Cf. Calvert v. Katy Taxi, Inc.,* 413 F.2d 841 (2d Cir. 1969) (naked proof of collision enough to go to jury); Morgan & Maguire, Cases and Materials on Evidence, 1076-79, 1088-94, 1106-12 (7th ed. 1983); *United States v. Schipani*, 289 F.Supp. 43 (E.D.N.Y. 1968), *aff'd*, 414 F.2d 1262 (2d Cir. 1969), *cert. denied*, 397 U.S. 922, 90 S.Ct. 902, 25 L.Ed.2d 102 (1970); *United States v. Fatico*, 458 F.Supp. 388, *aff'd*, 603 F.2d 1053 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073, 100 S.Ct. 1018, 62 L.Ed.2d 755 (1980).

To determine whether that substantial probability exists in this case, the Special Master, Sol Schreiber, was directed to conduct a limited evidentiary hearing. *Cf. "Dalkon Shield,"* 693 F.2d at 852 ("the district court erred by ordering certification without ... even a preliminary fact-finding inquiry concerning [the defendant's] actual assets, insurance, settlement experience and continuing exposure."). At the hearing, defendants' counsel submitted certified copies of their most recent balance sheets. The plaintiffs' counsel selected a cross-section of their cases and made a brief presentation as to the nature of the damage alleged. The Master found that the combined net assets of the defendants, includ-

ing insurance, total approximately $9 to $16 billion. Collection of judgments, if any, would be spread over a number of years and payment could probably be handled from year-to-year and paid out of earnings. The Master also found that, based on the information presently available, his best estimate is that the number of claims may total 40,000 to 50,000. He concluded that the evidence now before the court does not support the view that provable claims will exhaust the defendants' assets.

The court has carefully reconsidered the Master's findings and all other information before the court. It is convinced that the risks as reasonably evaluated at this stage of the litigation allow (b)(1) certification on the issue of punitive damages only. The power of the court to certify the class under more than one section is not contested by the parties. *See* Manual for Complex Litigation § 1.43 (1982).

Plaintiffs contend that the limited fund can be found here in one of two ways. First, they contend that compensatory damages will exceed the net worth of the defendants. Second, they contend that even if the compensatory damages do not satisfy (b)(1), punitive damages will.

As to their first contention, the information elicited at the hearing and in appearances before this court indicates that sufficient assets are and will be available to respond to any probable judgments. Without the aid of a full trial, on the basis of facts presently available, it cannot be said that there is a substantial probability that if plaintiffs' claims are successful, the compensatory recovery will exceed defendants' assets.

Based on information thus far supplied to the court, it also cannot be found, as a preliminary matter, that there is a substantial probability that punitive damages, if allowed will, when added to compensatory damages, exceed defendants' assets. Apart from the equivocal nature of the evidence on the claimed callous disregard by the defendants of the effect of their product, also militating against a trial on award on

punitive damages is the fact that prejudicial evidence is likely to be introduced on the punitive damage issue. Finally, there may be a policy against substantial punitive damages in a case such as this. An award of huge punitive damages might discourage [728] government contractors from bidding for defense contracts and manufacturing material vitally needed for the national defense and might "seriously impair" the government's "ability to formulate policy and make judgments pursuant to its war powers." *Sanner v. Ford Motor Co.*, 144 N.J. Super. 1, 364 A.2d 43 (1976), *aff'd*, 154 N.J. Super. 407, 381 A.2d 805 (1977), *cert. denied*, 75 N.J. 616, 384 A.2d 846 (1978).

Evidence that the government had almost as much, if not more, knowledge of the dangers posed by Agent Orange, and control by the government of its use are among the additional factors that would argue against punitive damages. It would be unfair to punish the defendants while the government, which might be equally, or even more, culpable, avoided all liability. Finally, merely instructing the jury as to punitive damages may distort the juror perceptions and make the case even more difficult to control. *See Koufakis v. Carvel,* 425 F.2d 892, 905 (2d Cir. 1970).

Nevertheless, there is a substantial probability that limited punitive damages may be allowed. If they are, it would be equitable to share this portion of the possible award among all plaintiffs who ultimately recover compensatory damages. Yet, if no class is certified under Rule (b)(1)(B), non-class members who opt out under Rule 23(b)(3) would conceivably receive all of the punitive damages or, if their cases are not completed first, none at all.

It is axiomatic that the purpose of punitive damages is not to compensate plaintiffs for their injury, but to punish defendants for their wrongdoing. In theory, therefore, when a plaintiff recovers punitive damages against a defendant, that represents a finding by the jury that the defendant was sufficiently punished for the wrongful conduct. There must,

therefore, be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction. *See, e.g., Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 838-42 (2d Cir. 1967). Putz & Astiz, Punitive Damage Claims of Class Members Who Opt Out: Should They Survive?, 16 U.San.Fran.L.Rev. 1, 18-40 (1981). At the very least, a trial court in passing on future claims may admit evidence as to the payment of prior awards which may be used by a jury to reduce an award to a party seeking additional punishment for the same misconduct. *See, e.g., State ex rel. Young v. Crookham,* 290 Or. 61, 618 P.2d 1268, 1272-73 (1980); Redden, Punitive Damages, § 4.8 (1980); Restatement (Second) of Torts, § 909 (1977); Morris, Punitive Damages in Tort Cases, 44 Harv.L.Rev. 1173, 1195 (1931). There is, therefore, a substantial probability that "adjudication with respect to individual members of the class ... would as a practical matter be dispositive of the interests of the other members not parties to the adjudication." Accordingly, a class of all those described as members of the (b)(3) class are also certified under (b)(1)(B). The (b)(1)(B) certification is for the award of punitive damages.

How this decision under (b)(1)(B) affects plaintiffs' rights to opt out under Rule (b)(3) need not be decided now. In the first place, it is not clear that any appreciable number of plaintiffs will exercise their right to opt out under (b)(3). Nor is it clear that any punitive damages will be awarded. Thus, it seems sensible to allow exercise of opt-out powers, with the ultimate effect of that decision to be left for resolution on motion, full briefing and argument.

Assessment of possible damages is for the purpose of a class certification ruling only. It does not constitute a determination of what damages will be allowed after trial.

CLASS DEFINITION AND NOTICE

There remain the questions of defining the class and notice to the class. The defendants' contention that the class as

the court has defined it is unworkable because it is subjective ("all veterans who were injured ... by exposure to Agent Orange") is a *non sequitur*. Subjectiveness does not [729] affect the applicability of the class trial's findings to members of the class and it does not prejudice the defendants in any way. The class is, therefore, adequately defined and clearly ascertainable. *See Ihrke v. Northern States Power Company,* 459 F.2d 566 (8th Cir. 1972).

Federal Rule 23(c)(2) provides that, in a class action maintained under Rule 23(b)(3),

> the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

When members of the class can be identified through reasonable effort, individual notice is required; the expense of giving the notice must be paid by plaintiffs. *See Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974); *Abrams v. Interco, Inc.*, 719 F.2d 23 at 30 (2d Cir. 1983).

What is "the best notice practicable under the circumstances" and what constitutes "reasonable effort" is a determination of fact to be made in the individual litigation. *In re Franklin National Bank Securities Litigation*, 599 F.2d 1109 (2d Cir. 1978); *see also In re Nissan Motor Corp. Antitrust Litigation,* 552 F.2d 1088, 1098 n.11 (5th Cir. 1977) (and cases cited therein); C. Wright & A. Miller, Federal Practice & Procedure, at § 1786; Manual for Complex Litigation, § 1.45 (1982).

Accordingly, it is ORDERED:

1. Certification of this matter as a class action under Federal Rule of Civil Procedure 23(b)(3) is granted. Judge Pratt's decision certifying the class action status of this litigation under Rule 23(b)(3) is modified and confirmed. Plaintiffs' motion seeking certification under Rule 23(b)(1)(B) is granted only with respect to the claim for punitive damages.

2. The plaintiff class is defined as those persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides, including those composed in whole or in part of 2, 4, 5- trichlorophenoxyacetic acid or containing some amount of 2, 3, 7, 8- tetrachlorodibenzo-p-dioxin. The class also includes spouses, parents, and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure.

The definition does not imply a conclusion that anyone within the class was injured as a result of exposure to any herbicide.

3. Notice to the members of the class shall be provided as follows:

(a) Plaintiffs' counsel, at their own expense, shall cause a copy of the written notice, attached as Exhibit A, to be mailed by first class United States mail to all persons who have filed actions as plaintiffs in the District Courts of the United States, or filed actions in state courts later removed to a federal court, which are pending in or have been transferred to this court for consolidated proceedings by the Panel on Multi-District Litigation, together with all persons who have moved to intervene or are intervenors, and each class member presently represented by counsel associated with plaintiffs' management committee who has not yet commenced an action or sought intervention. Mailing of the notice shall take place within 30 days of this Order.

(b) Plaintiffs' counsel, at their own expense, shall cause to be mailed a copy of the written notice to all persons who are currently listed on the United States Government's Veteran's Administration "Agent Orange Registry." This mailing shall take place within 50 days of this Order.

(c) Notice shall be mailed in envelopes that are printed only with the names of the addressee and the Clerk of this Court. Plaintiffs' counsel shall maintain a record of the name

and address of each person to whom the notice is mailed. The record shall be filed with the Clerk of the Court not later than 70 days after the issuance of this Order.

(d) Plaintiffs' counsel, at their own expense, shall obtain a post office box in Smithtown, New York, 11787, in the name [730] of the Clerk of the Court, and advise the court and the parties of the box number not later than 15 days after the issuance of this Order. The box shall be rented until further order of the court. Plaintiffs' counsel shall on a daily basis review the contents of the post office box and prepare a listing of all exclusion requests received, which shall be available to the court and the parties for inspection and copying, together with the exclusion requests. Plaintiffs' counsel shall send a copy of the notice and the exclusion request form to each person who writes to the Clerk of the Court requesting them. Each day plaintiffs' counsel shall transmit to the court and the parties copies of any communications (other than exclusion requests or requests for forms) that are received at the post office box. Plaintiffs' counsel shall maintain a record, together with the originals, of all mail returned as undelivered.

(e) Plaintiffs' counsel, at their own expense, shall serve a radio and television announcement notice in the form of Exhibit B on the nationwide networks of the American Broadcasting Company, the Columbia Broadcasting System, the Mutual Broadcasting System, the National Broadcasting Company, and the Public Broadcasting and Television Networks and on radio stations with a combined coverage of at least 50 percent of the listener audience in each of the top one hundred radio markets in the United States within 50 days of this Order.

Along with the radio and television notice served upon the nationwide radio and television broadcasting systems and radio stations, plaintiffs' counsel shall request that the notice be read as set forth in Exhibit B without interruption or comment, either alone or in conjunction with the showing on

television of the text of Exhibit B. Plaintiffs' counsel shall request that each participating radio and television broadcasting station advise them of the dates and times at which the notice was broadcast or shown.

Within 90 days of this Order, plaintiffs' counsel shall furnish to the court and the parties a report identifying the name and location of each radio station broadcasting the announcement, if known, and the date and time of each announcement. The court will then determine if further notice is required.

(f) Plaintiffs' counsel, at their own expense, shall publish in the following newspapers and magazines an announcement in two successive weeks (but if publication is monthly, only once) in the form of Exhibit C: the nationwide edition of *The New York Times, U.S.A. Today, Time Magazine,* the *America.. Legion Magazine, VFW Magazine, Air Force Times, Army Times, Navy Times,* and the *Leatherneck;* the ten largest circulation newspapers in Australia, including *The Australian;* and the five largest daily circulation newspapers in New Zealand, including *The Dominion.* Publication shall be completed as soon as practicable, but no later than March 1, 1984. The size of the notice shall be not less than one-eighth, nor more than one-third, of the newspaper or magazine page.

(g) Plaintiffs' counsel shall, at their own expense, obtain a toll-free "800" telephone number in the name of the Clerk of the Court. The number shall be in effect no later than January 1, 1984 to at least May 1, 1984. The number shall be manned on a daily basis, from at least Monday to Friday, 9:00 a.m. to 5:00 p.m., E.S.T., with knowledgeable persons (or a recorded announcement and recording device) who shall tell callers where to write for further information, but who shall not give advice concerning rights and responsibilities in this litigation. A record of those calling and giving their names and addresses shall be kept. Those requesting a copy of Exhibit A shall be sent one. No oral exclusion request shall be taken. Plaintiffs' counsel shall give written instructions to those answering the phone. A copy of such instructions and any recorded announcement shall be filed with the Clerk.

(h) The Clerk of the Court shall send this order and notice to the Governor of each of the states of the United States. He shall respectfully request each Governor to refer the notice to any state organization created by the executive or legislative branches [731] dealing with the problems of Vietnam veterans and request that the notice be sent to all those known Vietnam veterans who may be members of the class described in the Order, or that a list of names and addresses be supplied to this court so that notice may be mailed by the plaintiffs' counsel. The Clerk shall respectfully request a list of those to whom notice has been sent by any state agency.

(i) The notice provided for in this Order is the best reasonable and practicable notice under the circumstances of this litigation.

This Order is stayed for seven days to permit an application for a further stay to the Court of Appeals.

So Ordered.

Exhibit A

LEGAL NOTICE TO CLASS MEMBERS OF PENDENCY OF CLASS ACTION

This notice is given to you pursuant to an Order of the United States District Court for the Eastern District of New York and Rule 23(c)(2) of the Federal Rules of Civil Procedure. It is to inform you of the pendency of a class action in which you may be a member of the class, and of how to request exclusion from the class if you do not wish to be a class member. None of the claims described below have been proven. It is contemplated that a trial by court and jury will take place in this court beginning in May, 1984.

1. There are now pending in the United States District Court for the Eastern District of New York claims brought by

individuals who were in the United States, New Zealand, or Australian Armed Forces assigned to or near Vietnam at any time from 1961 to 1972, who allege personal injury from exposure to "Agent Orange" or other phenoxy herbicides, including those composed in whole or in part of 2, 4, 5-trichlorophenoxyacetic acid or containing some amount of 2, 3, 7, 8-tetrachlorodibenzo-p-dioxin (collectively referred to as "Agent Orange").

2. The plaintiffs include spouses, parents, and children born before January 1, 1984, of the servicepersons who claim direct or derivative injury as a result of exposure. Plaintiffs include children asserting claims in their own right for genetic injury and birth defects caused by their parents' exposure to "Agent Orange" and other phenoxy herbicides. Wives of veterans exposed to "Agent Orange" in Vietnam seek to recover in their own right for miscarriages. Plaintiffs' theories of liability include negligence, strict products liability, breach of warranty, intentional tort and nuisance. Damage claims of family members include pecuniary loss for wrongful death, loss of society, comfort, companionship, services, consortium, guidance and support. In addition, plaintiffs seek punitive damages for defendants' alleged misconduct in furnishing herbicides to the United States Government.

3. The defendants, who are alleged to have manufactured or sold "Agent Orange" to the United States Government, are Dow Chemical Company, Monsanto Company, T.H. Agriculture & Nutrition Company, Inc., Diamond Shamrock Chemicals Company, Uniroyal, Inc., Hercules Incorporated, and Thompson Chemical Corporation. All the defendants deny that the plaintiffs' alleged injuries were in any way caused by "Agent Orange." They assert that injury, if any, was not caused by a product produced by them. The defendants have challenged these suits on various other grounds including plaintiffs' lack of standing to sue, lack of jurisdiction, statutes of limitation, insufficiency in law, plaintiffs' contributory negligence, and plaintiffs' assumption of known

risks. Each has also asserted such affirmative defenses as the "government contract defense" and the Government's misuse of its product. In third-party complaints, the defendants asserted claims against the United States of America seeking indemnification or contribution in the event the defendants are held liable to the plaintiffs. The Government has asserted its power to prevent anyone from suing it.

4. This court has certified a class action in this proceeding under Rule 23(b)(3) of the Federal Rules of Civil Procedure. The [732] plaintiff class consists of those persons who were in the United States, New Zealand, or Australian Armed Forces assigned to Vietnam at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to "Agent Orange" or other phenoxy herbicides including those composed in whole or in part of 2, 4, 5- trichlorophenoxyacetic acid or containing some amount of 2, 3, 7, 8- tetrachlorodibenzo-p-dioxin. The class also includes spouses, parents, and children born before January 1, 1984, directly or derivatively injured as a result of the exposure.

The court may reconsider this decision, by decertifying, modifying the definition of the class, or creating subclasses in the light of future developments in the case. The definition does not imply a conclusion that anyone within the class was injured as a result of exposure to any herbicide.

5. The court has also certified a Rule 23(b)(1)(B) class limited to claims for punitive damages. The class includes the same persons as are in the Rule 23(b)(3) class. The court has decided not to permit members of the class to seek exclusion on the issue of punitive damages. You will therefore be bound by the court's rulings on punitive damages whether or not you seek exclusion on the issue of compensatory damages.

6. Trial of the representative plaintiffs' claims is scheduled to commence before Jack B. Weinstein, Chief Judge of the United States District Court for the Eastern District of New York, and a jury on May 7, 1984.

7. If you are a member of the plaintiff class you will be deemed a party to this action for all purposes unless you request exclusion from the Rule 23(b)(3) class action covering compensatory damages.

8. If you do not request exclusion from the class by May 1, 1984, you will be considered one of the plaintiffs of this class action for all purposes. You may enter an appearance through counsel of your own choice. You will be represented by counsel for the class representatives unless you choose to enter an appearance through your own legal counsel.

9. Class members who do not request exclusion will receive the benefit of, and will be bound by, any settlement or judgment favorable to the class covering compensatory damages. The class representatives' attorneys fees and costs will be paid out of any recovery of compensatory and other damages obtained by the class members. You will not be charged with costs or expenses whether or not you remain a member of the class. However, if you choose to enter an appearance through your own legal counsel, you will be liable for the legal fees of your personal counsel.

10. Class members who do not request exclusion will be bound by any judgment adverse to the class, and will not have the right to maintain a separate action even if they have already filed their own action.

11. If you wish to remain a member of the class for all purposes, you need do nothing at this stage of the proceedings.

12. *If you wish to be excluded from the class for compensatory damages, you must submit a written request for exclusion.* For your convenience, the request for exclusion may be submitted on the attached form, entitled "Request for Exclusion." If you received this notice by mail, a Request for Exclusion form should have accompanied it. If you did not receive a Request for Exclusion form, you may obtain a copy by writing to the Clerk of the Court, P.O. Box __,

Smithtown, New York 11787. A written Request for Exclusion may be submitted without using the Request for Exclusion form, but it must refer to the litigation as "In re 'Agent Orange' Product Liability Litigation, MDL No. 381"; include your name and address in your statement requesting exclusion. Any request for exclusion must be received on or before May 1, 1984 by the Clerk of the United States District Court for the Eastern District of New York at Post Office Box __, Smithtown, New York, 11787 or at a federal courthouse in the Eastern District of New York.

13. Under the court's Order, all potential plaintiffs are deemed to be members of [733] a Rule 23(b)(1)(B) class on the issue of punitive damages. At the time of trial the court will determine whether the facts presented warrant the submission of a punitive damage claim to the jury. In the event that there is a recovery for punitive damages, it will be shared by those plaintiffs who are successful in prosecuting their claims in this or other suits on an appropriate basis to be determined by the court. If you choose to exclude yourself from this class action on the issue of compensatory damages, you may do so without necessarily losing your right to share in any punitive damages.

14. The plaintiffs in this class action are represented by a group of attorneys who have been tentatively approved by the Court as the Agent Orange Plaintiffs' Management Committee. Members of this committee include:

Phillip E.Brown, Esq.
Hoberg, Finger, Brown, Cox & Molligan
703 Market Street (18th Floor)
San Francisco, California 94103

Stanley M. Chesley, Esq.
Waite, Schneider, Bayless and Chesley Co. L.P.A.
1513 Central Trust Tower

Fourth and Vine Streets
Cincinnati, Ohio 45202

David J. Dean, Esq.
Dean, Falange & Rose
One Old Country Road
Carle Place, New York 11514

Thomas W. Henderson, Esq.
Baskin & Sears
Frick Building (10th Floor)
Pittsburgh, Pennsylvania 15219

Benton Musselwhite, Esq. & John O. O'Quinn, Esq.
609 Fannin (Suite 517)
Houston, Texas 77002

Stephen J. Schlegel, Esq.
Schlegel & Trafelet, Ltd.
One North LaSalle Street
Suite 3900
Chicago, Illinois 60602

Newton B. Schwartz, Esq.
Houston Bar Center Building
723 Main (Suite 325)
Houston, Texas 77002

David J. Dean, Esq. Has been designated by the court as plaintiffs' spokesman. The Management Committee is being

aided in its duties of representing the interests of the plaintiffs by other law firms in the United States and abroad.

15. *Examination of pleadings and papers.* This notice is not all inclusive. References to pleadings and other papers and proceedings are only summaries. For full details concerning the class action and the claims and defenses which have been asserted by the parties, you or your counsel may review the pleadings and other papers filed at the office of the Clerk of the United States District Court for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201, on any business day from 9:00 a.m. to 5:00 p.m.

16. *Interpretation of this Notice.* Except as indicated in the orders and decisions of the United States District Court for the Eastern District of New York, no court has yet ruled on the merits of any of the claims or defenses asserted by the parties in this class action. This notice is not an expression of an opinion by the court as to the merits of any claims or defenses. This notice is being sent to you solely to inform you of the nature of the litigation, your rights and obligations as a class member, the steps required should you desire to be excluded from the class, the court's certification of the class, and the forthcoming trial.

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[734] Robert C. Heinemann
Clerk, United States District
Court for the Eastern District
of New York
DATED: Brooklyn, New York
January 12, 1984

EXCLUSION REQUEST FORM

Clerk

United States District Court
for the Eastern District of New York
P.O. Box __
Smithtown, New York 11787

Re: In re "Agent Orange" Product Liability
Litigation MDL No. 381

I hereby request to be excluded from the class action in the above-captioned matter.

_____
(Signature)

Name (print): _____

Address: _____

If not a member of the armed forces who served in or near Vietnam, how are you related to such a serviceperson? _____

Armed forces unit of serviceperson_____

Armed forces identifying number of serviceperson

_____

I learned about this suit by

_____

Exhibit B (Radio and Television Communication)

SPECIAL ANNOUNCEMENT

Were you or anyone in your family on military duty in or near Vietnam at any time from 1961 to 1972? If so, listen carefully to this important message about a pending "Agent Orange" lawsuit that may affect your rights.

If you or anyone in your family claim injury, illness, disease, death, or birth defect as a result of exposure to "Agent Orange," or any other herbicide in or near Vietnam at any time from 1961 to 1972, you are now a member of a class in

an action brought on your behalf in the United States District Court for the Eastern District of New York, unless you take steps to exclude yourself. The class is limited to those who were injured by exposure to Agent Orange or any other herbicide while serving in the armed forces in or near Vietnam at any time from 1961 to 1972. The class also includes members of families who claim derivative injuries such as those to spouses and children.

The court expresses no opinion as to the merit or lack of merit of the lawsuit. It has ordered that this message be transmitted to give as many persons as is practicable notice of this suit.

For details about your rights in this "Agent Orange" class action lawsuit, call 1-800-_____, or write to the Clerk of the United States District Court, Box __, Smithtown, New York 11787. That address again is Clerk of the United States District Court, P.O. Box __, Smithtown, New York 11787, or call 1- 800-_____.

Exhibit C (Newspaper and Magazine Notice)

TO ALL PERSONS WHO SERVED IN OR NEAR VIETNAM AS MEMBERS OF THE ARMED FORCES OF THE UNITED STATES, AUSTRALIA AND NEW ZEALAND FROM 1961-1972

If you or anyone in your family can claim injury, illness, disease, death or birth defect as a result of exposure to "Agent Orange" or any other herbicide while assigned in or near Vietnam at any time from 1961 to 1972, you are a member of a class in an action brought on your behalf in the United States District Court for the Eastern District of New York unless you take steps to exclude yourself from the class. The class is limited to those who were injured by exposure to "Agent Orange" or any other herbicide while serving in the armed forces in or near Vietnam at any time during 1961-1972. The class also includes members of families who claim derivative injuries such as those to spouses and children.

The court expresses no opinion as to the merit or lack of merit of the lawsuit.

[735] For details about your rights in this "Agent Orange" class action lawsuit, call 1-800-_____, or write to Clerk of the Court, Box __, Smithtown, New York 11787.

_____

_____

Robert C. Heinemann
Clerk, United States District
Court for the Eastern District
of New York
DATED: Brooklyn, New York
December , 1983